SEMI-CENTENNIAL MEETING WILL BE HELD AT SEATTLE JULY 25, 26, 27

AMERICAN BAR ASSOCIATION JOVRNAL

JANUARY, 1928

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XIV JANUARY, 1928 No. 1

Semi-Centennial Meeting Will Be Held in Seattle July 25-27

THE Semi-Centennial Meeting of the American Bar Association goes to Seattle and the date is July 25, 26 and 27. This decision was reached at the midwinter meeting of the Executive Committee held in New Orleans on January 9, 10 and 11. Ample hotel and meeting facilities are assured and the weather conditions during the month selected for the meeting, to judge from the record of many years, will be ideal and dependable. Invitations were received from several other cities, but the Committee decided after careful consideration that it would be best to meet this year on the coast.

Acceptance of the invitations from the Washington State Bar Association and the Seattle Bar Association was urged in person by Mr. Alfred H. Lundin of the Seattle Bar. These invitations, extremely cordial in tone, had already been extended in the form of telegrams to President Strawn by Mr. Maurice A. Langhorne, President of the Washington State Bar Association, and Mr. Ira Bronson, President of the Seattle Bar Association, on behalf of those organizations and in accordance with definite action taken at regular meetings. There was also presented a resolution passed at the last annual meeting of the Oregon Bar Association and signed by Mr. John Guy Wilson of Portland, Secretary, in which that organization joined with the Washington State Bar Association in urging that the next annual meeting be held in Seattle. At the special request of the Seattle Committee, Mr. Curtis A. Keen, manager of the convention department of the Seattle Chamber of Commerce, who was on a trip to the east, went to New Orleans and appeared before the Executive Committee for the purpose of giving details of the numerous facilities which the city affords for meetings of this kind. Mr. Glenn J. Fairbrook is chairman of the Seattle Bar Association's Committee on the annual meeting of the Association in that city and he has been very active during recent months in pressing the claims of Seattle by correspondence and otherwise.

The Semi-Centennial meeting, which is expected to be a particularly notable one and for which a special program is being prepared, will be held in the new Civic Auditorium. This handsome structure will be opened on June 10, but even should there be some slight delay in completion, it is fairly certain it will be ready in time for the meeting during the latter part of July. The main auditorium will seat 7,500 people—5,000 on the main floor and 2,500 in the balcony. Kitchen equipment is provided for serving 3,000 persons at one sitting at a banquet in the auditorium, and numerous committee rooms and smaller rooms will be available. In addition to the hotel and other facilities for the meeting, Seattle offers a remarkable opportunity for side trips before and after the meeting to points of great scenic interest and beauty.

While on the subject of the Semi-Centennial, it is pertinent to add that the Special Committee on program for this occasion, of which President Silas H. Strawn is chairman, held several conferences at New Orleans during the recent meeting of the Executive Committee. Various plans to make the program unusually interesting were considered. A sub-committee of this Special Committee, consisting of Hon. J. Weston Allen of Boston, Major Edgar B. Tolman of Chicago, and Mr. James Grafton Rogers of Denver, was appointed to consider the program further and report as soon

as its plans were sufficiently matured. All the members of the Special Committee on the Semi-Centennial Celebration are members of the Executive Committee.

The annual meeting did not by any means go to Seattle by default. A special committee from Memphis, composed of Elias Gates, chairman, Mr. Phil M. Canale and Mr. Lovick P. Miles, presented an invitation from the Bar Association of Tennessee, the Memphis and Shelby County Bar Association and other organizations to hold the next annual meeting at Memphis. This committee presented information with regard to the hotel and other facilities of Memphis which left no doubt that the Association would find there everything needed to insure comfort and convenience. It also strongly urged that the time had come for holding an annual meeting in the South. "More than seventeen years have passed," said the official invitation extended by the Memphis Committee, "since the last meeting was held in the South, that is, the one which was held in the city of Chattanooga in the year 1910. The South needs the inspiration of a meeting of the American Bar Association more than any other section of the country." As to the weather argument, the committee pointed out that extremely warm weather had prevailed at various meetings north of Memphis. It added, however, that there was no fixed date for the meeting and that if it were held in Memphis a little later than usual, say in September, there was a fair assurance of pleasant days and cool nights. The committee's presentation of the claims of the South to a meeting made a strong impression. Cordial invitations were also received from Kansas City and Atlantic City.

The Executive Committee received reports of progress from the various committees and sections of the Association and made the customary semi-annual appropriation of funds for carrying on their work. It approved rules of the Committee on Professional Ethics and Grievances respecting investigations and disciplinary proceedings, submitted by Chairman Thomas Francis Howe of Chicago. These are printed on another page of this issue. It made a special appropriation of $2,500 to the special committee on Oil Conservation of the Mineral Law Section, for the purpose of enabling it to investigate the situation. It appointed a Special Committee on Revision of the By-Laws, composed of Mr. E. A. Armstrong, chairman, and Messrs. Allen, Rogers, Boston and Pogue, to which were referred certain suggestions which had been presented to the committee. It also decided that the next meeting of the Executive Committee should be held in Washington on April 24.

The Louisiana lawyers maintained the reputation of New Orleans for hospitality by providing a most engaging and extensive program of entertainment not only for the members of the Executive Committee and committee chairmen in attendance on their sessions, but also for the Commissioners on Uniform State Laws who held their mid-winter meeting in New Orleans just preceding the meeting of the Executive Committee. Saturday morning the visitors were presented to and welcomed by the Supreme Court of Louisiana in the handsome structure in the old quarter. President Henry, of the

Louisiana Bar Association, presented the American Bar Association officials to the Court, and Mr. W. O. Hart presented the representatives of the Commissioners on Uniform State Laws. Judge Overton welcomed them to the city and state in the most cordial terms. President Strawn replied for the Executive Committee of the Association and Mr. Jesse A. Miller, of Des Moines, President of the Commissioners on Uniform State Laws, responded for that body. The Court and visitors then adjourned to a restaurant in one of the typical old houses of the vieux carré, where lunch was served.

Other features of the local program embraced a boat ride on the Mississippi, affording an idea of New Orleans as a seaport and of the tremendous harbor works which the State has carried out; a walk through the charming old quarter, concluding with a luncheon at which Mr. E. H. Randolph, of the Shreveport Bar, spoke briefly on Judah P. Benjamin; a luncheon at which Mr. Henry P. Dart, of the New Orleans Bar, made a most enjoyable address on "Francis T. Nicholls, Our Great Governor and Chief Justice;" dinner by the District Attorneys' Association, the New Orleans Bar Association and the Louisiana Bar Association, at which the visitors were guests of honor and at which Judge Rufus E. Foster, of the U. S. Circuit Court of Appeals, was toastmaster and three-minute talks were made by President Strawn, Edward A. Armstrong, Percy Saint, Attorney General of Louisiana, President Burt W. Henry, of the Louisiana Bar Association, and Eldon Lazarus, of the New Orleans Bar; auto trip through the city; special church service Sunday night at the First Presbyterian Church, when the pastor delivered a sermon on "The Christian Lawyer"; attendance at an open meeting of the District Attorneys' Association of Louisiana and the New Orleans and State Bar Associations, at which Mr. W. H. Washington, of Nashville, spoke on "Betterment of Judicial Procedure in the Administration of the Criminal Law;" special receptions for the visiting ladies by the Women's Clubs; attendance at the Twelfth Night Revelers' Ball, one of the Mardi Gras Balls which happened to be held during the stay of the visitors in the city, and attendance at the annual banquet of the Louisiana Historical Society as guests of honor of that organization. A feature of special interest on Sunday was the placing of a wreath on the tomb of Edgar H. Farrar, former President of the Association, by President Strawn, on which occasion Mr. H. Generes Dufour spoke briefly for the family.

All of the social events were greatly enjoyed by those who participated, and deep appreciation of the hospitality of the Louisiana hosts was expressed on all sides. The New Orleans committee in charge of entertainment consisted of W. O. Hart, Chairman; H. H. Chaffe, John D. Miller, Charles E. Dunbar, Jr., and W. W. Young. A dinner given in the old quarter by President Silas Strawn and Mrs. Strawn provided a delightful evening for the guests.

Commissioners on Uniform State Laws

THE Executive Committee of the Commissioners on Uniform State Laws met at New Orleans, January 6th and 7th. They voted to meet at Seattle, Washington, July 16th to 23rd, 1928, and to approve the following tentative program for that meeting:

July 16—A. M. President's address and Committees' reports.
P. M. Mechanics' Lien Act.
Evening. Dinner for the Commissioners and guests.

July 17—A. M. Mechanics' Lien Act.
P. M. Trust Receipts Act.

July 18—9:30 to 11:00 A. M. Trust Receipts Act.
11:00 A. M. to 12:30 P. M. Negotiable Instruments Law Amendments.
P. M. 2:00 to 3:30. Negotiable Instruments Law Amendments.
3:30 to 5:00. Public Utilities Act and Business Corporation Act.

July 19—A. M. Social Welfare Acts.
P. M. Social Welfare Acts.

July 20—A. M. Reports of Committees on Aeronautics, Compulsory Attendance of Witnesses in Guardianship of Soldiers.
P. M. No session.

July 22—A. M. Report of Committee on Corpus and Income.
P. M. Acknowledgment Act and Report of Committee on Uniform Firearms Act.

The Conference headquarters will probably be at the Olympia Hotel. Reservations should be made through the Secretary of the American Bar Association.

GEORGE G. BOGERT, Secretary,
University of Chicago Law School.

Fellowships in International Law

THE Division of International Law of the Carnegie Endowment for International Peace announces that fellowships in International Law will be awarded for the year 1928-29. The fellowships were established by the Trustees of the Endowment for the purpose of helping to provide an adequate number of teachers competent to give instruction in International Law and related subjects, and only those who intend to aid in this work are expected to apply. The fellowships to be awarded are divided into two classes—Teachers' Fellowships, for those who have taught International Law or related subjects for at least one year, and Students' Fellowships, which will be given only to graduate students holding the equivalent of a bachelor's degree. The stipend of the first class is $1,500 a year, with an additional $300 for those who elect to study abroad. The stipend of the second is $1,000 a year, with no additional allowance for foreign study. In general a knowledge of the elements of International Law and a good knowledge of History are necessary, and it is desirable that applicant know at least two modern languages. Applications will be received up to March 1, 1928, and application blanks and further information will be furnished on request addressed to Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C.

THE GROWTH OF ANGLO-AMERICAN LAW DURING AND SINCE THE DAYS OF BENJAMIN FRANKLIN*

United States Supreme Court Is Most Impressive Feature of Our Judicial Architecture—Court an Evolution Rather Than a Creation—Outline of Development—State Constitutions and Their Historical Antecedents—The Law of Contracts and Its Comprehensive Sphere—American Contributors to International Law—Torts —Remarkable Changes in Criminal Law, etc.

By Hampton L. Carson

Member of Philadelphia Bar; Former President American Bar Association

WITHIN the time allotted to me, I can do no more than sketch the outlines of so large a theme.—The most impressive feature of our judicial architecture—that which first strikes the eye and rivets the attention of the student by its simplicity of design and its noble proportions—is the dome-like jurisdiction of the Supreme Court of the United States. It fulfils the profound utterance of Edmund Burke that, "Whatever is supreme in a State ought to have, as much as possible, its judicial authority so constituted, as not only to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its jurisdiction as it were something exterior to the State."

The creation of that Court with its appellate powers was the crowning marvel of the lego-statesmanship of America. It is the finest and most precious conception of the Constitution. It embodies the loftiest ideas of moral and legal power, and although its prototype existed in the Supreme Courts established in the various States, yet the majestic proportions to which the structure has since been carried have become sublime. No product of government, either here or elsewhere, has ever approached it in grandeur. Within its appropriate sphere it is absolute in authority. From its mandates there is no appeal. Its decree is law. In dignity and moral influence it outranks all other judicial tribunals of the world. No Court of either ancient or modern times was ever invested with such high prerogatives. Its jurisdiction extends over Sovereign States as well as over the humblest individual. It is armed with the right as well as the power to annul in effect the statutes of a State whenever they are directed against the civil rights, the contracts, the currency or the intercourse of the people. It restricts Executive as well as Congressional action to Constitutional bounds. Secure in the tenure of its Judges from the influences of politics, the purse, the army, the navy, the temptations of appointment to office or of patronage, and far removed from the violence of prejudice and passion, it presents an example of judicial independence unattainable in any of the States, and far beyond that of the highest Court in England. Yet its powers are limited and strictly defined. Its decrees are not arbitrary, tyrannical or capricious, but are governed by the most scrupulous regard for the sanctity of law. It cannot encroach upon the reserved rights of the States or abridge the sacred privileges of local self-government. Its power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the legislature, under the Constitution, or in other words, to the will of the law. Its administration is a practical expression of the workings of our system of liberty according to law. Its members are the sworn ministers of the Constitution, and are the high priests of Justice. No institution of purely human contrivance presents so many features calculated to inspire both veneration and awe.

Speaking philosophically as well as historically the Court was not a creation but an evolution. In Franklin's day—the days of the Junto, which were the adolescent days of this Society—the thirteen colonies exercised the larger portion of their judicial authority through tribunals established directly or indirectly by themselves, under charters, grants, or proprietary forms of government, in accordance with the rules of the English Common Law, the principles of Equity, their own legislative Acts and usages, and such British Statutes as had been extended to or adopted by them.

But there were certain judicial controversies which were not within the jurisdiction of the Colonial Courts; and there were others, also, where the jurisdiction so exercised was subject to an appellate authority in the Crown. This condition lasted during the entire period of Colonial dependency upon the throne. This period is illustrated by the Courts of Vice-Admiralty, established in some of the Colonies by the Crown, by virtue of a right expressly reserved in the charters, or, in some cases, without any such reservation. The Royal commissions gave to these Courts ample jurisdiction over all maritime contracts, and over torts and injuries as well in ports as upon the high seas. Under the Navigation Act of 12 Charles II. (c. 2)—which was copied from that of Cromwell tracing its ancestry through Tudor statutes to the reign of Richard II.—

*Address delivered April 20, 1927, before the American Philosophical Society celebrating the two hundredth anniversary of the founding of the "Junto" by Benjamin Franklin, from which "Little Club" mentioned in his famous Autobiography, the Philosophical Society drew its existence.

and under the Revenue Act of 7 and 8 William III. (c. 22), this jurisdiction was enlarged by giving or confirming cognizance of all seizures for violations of the revenue laws.

It was held that appeals lay from the Colonial Vice-Admiralty Courts, in all cases to the Admiralty in England. In questions of prize, an appeal lay to the Commissioners of Appeals, consisting chiefly of members of the Privy Council. Again, the Colonies had numerous disputes with regard to their charter boundaries, and these came before the King, sitting in Privy Council, who exercised original jurisdiction upon the principles of feudal sovereignty. Sometimes, the dispute reached the Lord Chancellor as in the celebrated case of Penn vs. Lord Baltimore over Mason and Dixon's line. Finally, a general superintending power by way of appeal was exercised by the King from the decisions of the local Colonial tribunals, in matters of private rather than public significance. Many instances of such appeals occurred in Pennsylvania during Franklin's day, and were common before the Revolution all through the colonies. In these phenomena we find the germs of the Appellate jurisdiction of the Supreme Court of the United States.

Passing from the Colonial to the Revolutionary period we enter upon a stage of struggling development. The Continental Congress exercised, with the silent approbation of the Colonies, the underlying sovereign authority of the country so far as related to measures of war. After the Declaration of Independence, as a necessary consequence, the judicial authority of the Crown, as well as all its other authority, was suspended and ceased *ipso facto*. Congress raised armies and navies, directed military operations, emitted bills of credit, made treaties, received and sent out ambassadors, commissioned privateers, prescribed the objects of capture, and made rules for the distribution of prizes. It was in an urgent suggestion of Washington to the Continental Congress of the necessity of some central Court to deal with conflicting questions of prize that the germ of Federal authority is to be found.

In November, 1775, Congress recommended to the several Colonies that they should erect Courts of justice, or bestow jurisdiction upon those already in existence, to consider questions of capture, under such regulations as should seem expedient, reserving, however—and this is the important feature—in all cases an Appeal to Congress, or to such persons as might be designated by Congress, for the consideration of trials of appeals. That jurisdiction was first exercised by special committees appointed from time to time, called Congressional Committees of Appeals. Sixty-four cases—the records of which still exist—came before the Congress. Much difficulty, however, arose in the final enforcement of the authority of Congress, the weak point being that it depended upon State officers to carry into effect the judgment of the appellate tribunal when reversing a State Court. It frequently happened that the States refused to enforce the rights of property acquired under Federal decrees. It was not until after the Constitution of The United States had long gone into effect that the fires of controversy were extinguished.

In January, 1780, Congress grew tired of Special Committees, and established a Court for the trial of all appeals from the Admiralty Courts of the States, consisting of three Judges commissioned and paid by Congress, under the style "The Court of Appeals in Cases of Capture." This tribunal took over eleven cases then depending before Congressional Committees and disposed of forty-five new cases, thus making in all a list of one hundred and ten cases disposed of by Federal Congressional authority. (See Appendix to 131 U. S. Rep.)

Controversies also arose between the States as to soil and jurisdiction. Pennsylvania and Virginia contended together as to their western boundaries. Pennsylvania and Connecticut contended over the Connecticut claim to the upper half of present Pennsylvania; Pennsylvania and New York contended over the "smoke stack" upon Lake Erie; New York, New Hampshire and Massachusetts disputed over the New Hampshire grants which now constitute Vermont; Virginia and New Jersey presented conflicting claims to that distant tract on the Ohio which is now called Indiana; New York and Connecticut wrangled over a boundary line fixed in 1651 by Dutch and English agreement in the days of Peter Stuyvesant of New Amsterdam, now the City of New York. Massachusetts and New York, and South Carolina and Georgia had their separate disputes.

Then came a third period—that of the attempted government of The United States by the Continental Congress under the Articles of Confederation. These Articles, assented to by Congress on the 15th of November, 1777, did not become operative until nine States had assented, so that action under them was delayed until March, 1781. The Ninth Article, drafted by John Dickinson and Benjamin Franklin, provided for four classes of cases, vesting in Congress the exclusive right and power to deal with piracies and felonies on the high seas, cases of capture, disputes between the States, and controversies between private citizens concerning the right of soil claimed under grants from two or more States.

The weak point was in the matter of enforcement. Reliance was had upon the judges of the Supreme Courts of the States. State judges sat, as was natural, in a State court house, verdicts were sought from State jurors; prisoners, when convicted, were under the custody of State officers, and, if executed, were hanged by the State officer, the sheriff. Even infractions of the law of nations, of the immunities of foreign ambassadors, of the law of treason, and violations of the ordinances relating to the Post Office of The United States, were dealt with entirely through the State Courts.

Let me emphasize the point that under the Confederation no tribunal, State or *quasi* State, Congressional or *quasi* Congressional, ever pretended to be vested with the appellate authority, which, before the Revolution, had been exercised by the King in Privy Council from the decisions of the Colonial Courts. Appellate power is necessary to uniformity of decision, to effective regulation, to the enforcement of obedience. The Continental Congress, even under the Confederation, was not a government. It had a head and a body, but it had no hands. It could not take hold of a citizen or seize upon property. It was a loose league, for while the States were tied together after a fashion, individual citizens were not. The Congress could

pledge the public faith, but could not redeem it. It could not raise any revenue, levy any tax, enforce any law, secure any right or regulate any trade. It could declare everything, but could do nothing. It was entirely at the mercy of thirteen State legislatures. It had no resource except persuasion. It dared not impose a fine, for it could not collect it. It could not imprison, for it could not act against the person of a citizen. Behind the Continental currency there was no taxing power. The only way in which money could be raised was by requisitions on the States, but compliance depended entirely on the good nature, resources and patriotism of the State Legislatures. Sometimes obedience was tardy; sometimes resistance was defiant. Every measure, however just, required the assent of nine States, and however urgent the necessity for immediate action, involved the fatal delay of debate in thirteen separate Legislatures.

From the deep pit of ruin, despair, civil paralysis, bankruptcy, disunion, discord and dishonor, into which we were cast after the Treaty of Peace acknowledging our Independence, we were saved by the Constitution of The United States. In the work of framing this instrument of salvation, Franklin, in spite of his weight of years, bore an honorable and effective part. The founder of the Junto—the father in a very real sense of this Society—he lived to become one of the Founders of the Nation.

I cannot enter upon a sketch of Constitutional Law, nor attempt a delineation of the manner in which the imprisoned power of the Constitution was released like steam upon an untried engine. The Appellate power of the Supreme Court of The United States was made effective by the Judiciary Act of September 24, 1789. Enough has been presented to give the tracings in outline of the origin and gradual evolution of that system of Appellate jurisdiction which has made the Supreme Court the guardian of our National rights and liberties—"an indivisible union of indestructible States."

As an old-fashioned lawyer I cannot but protest against recent efforts to graft upon the Constitution a bundle of police regulations foreign to its nature and destructive of the matchless symmetry of our system. Yet, I am optimistic enough to believe that the Constitution will survive all assaults, encouraged by the thought that the Pyramid of Cheops has stood four thousand years, unshaken by the barkings of the jackals at its base.

The second object of our attention consists of the group of State Constitutions. These, though of lesser dignity and scope than the Constitution of The United States, were of earlier origin, involving substantially the same principles of self-government. They were all evolved from the Colonial Charters which themselves were the product in modified form of the Charters of ancient towns, but particularly of great trading Corporations which sprang from the awakened commercial rivalries between nations following the discovery of the New World, and the seeking of shorter routes to the Spice Islands of the far East, the gold coast of Guinea, the forests of Brazil and the mines of Peru. Corporate management under Charters, of which the Muscovy Company and The British East India Company were early examples, almost of necessity involved the ideas of representation of owners through boards of directors, business-like procedure, distribution of official powers, financial responsibilities, and ultimate accountability. They were all primary schools of what in time became ripened citizenship. The Selden Society, in a separate volume entitled Select Charters, has assembled nearly fifty examples which can be examined with advantage by the student of Anglo-American institutions before analyzing and comparing the Colonial Charters of the Old Thirteen.

The historical antecedents of these Charters belong to two distinct periods—the first being that of Discovery, stimulated by trade ambitions, extending from 1496 to 1606; the second being that of Colonial grants, animated in striking instances by the nobler motives of religious freedom and benevolent colonization, extending from 1606 to 1681, or, if Georgia be included, to 1732.

I have no space for exact analysis, but the rich material is easily at hand in the late Professor Thorpe's authoritative work, published by Congress, entitled Colonial Charters, and in MacDonald's Select Charters. Suffice it to say that all these Colonial Charters were carefully drafted by the most eminent lawyers of their day, while occupying the offices of Attorney General and Solicitor General of the Crown. Among these appear the famous names of Sir Edward Coke, Sir John Dodderidge, Sir Henry Hobart, Sir Francis Bacon, Sir Edwin Sandys, Sir Robert Heath, Sir William Noy, and Sir Creswell Levinz. Even Lord Chief Justice North, the Earl of Clarendon, and the philosopher, John Locke, had a hand.

As might be expected, the earliest charters placed legislative and executive powers in a Governor and Council nominated by the Crown and guided by its instructions. In time, royal influence was checked by extemporized popular elements springing from colonial soil. Then, later, the burden of organizing governments was put upon the shoulders of single individuals, as proprietors, while in two instances the Charters constituted almost a pure democracy. With all this material the leading men of the day, especially Franklin, Dickinson and Dulany, were thoroughly familiar. Franklin had been especially disciplined by his long struggle with the sons of Penn; Dickinson of Pennsylvania and Dulany of Maryland by their legal studies in the Inns of Court, while the Adamses and Otis of Massachusetts were advocates of natural rights. Lesser men by their skill as pamphleteers displayed a complete familiarity with the successive features of the Bill of Rights of the days of James I, the Cromwellian Reforms and the results of the English Revolution obtained through the abdication of James II.

No one can examine the mass of politico-controversial literature of the period marked by the agitation over the Stamp Act, or study the State papers issued by the First Continental Congress, which evoked the open admiration of the Earl of Chatham, without being impressed with the knowledge displayed by their authors of the inherent rights of Englishmen under what was vaguely called the English Constitution, as asserted from time to time since the days of Magna Charta. Three works were especially in familiar favor—Hooker's "Ecclesiastical Polity," Hobbes' "Levia-

than," and Milton's "Essay on the Liberty of Unlicensed Printing," in the matter of the development of far-reaching thought. Locke on "Civil Government," Montesquieu on the "Spirit of Laws," and Blackstone's "Commentaries" were of very direct influence in compressing political speculation into practical moulds. Locke embodied the essence of the English Revolution; Montesquieu insisted on a scientific division between Legislative, Executive and Judicial powers. Blackstone furnished the most finished and intelligible analysis of the English Constitution and gave "a new birth to the Common Law in America," through the happy circumstance of a Philadelphia publication of his work five years prior ot the Declaration of Independence.

Hence, it was, that when the Declaration, like a sharp knife, severed the tie that bound the Colonies to the throne, each Colony fell back upon its inherent Sovereignty, and at the suggestion of the Continental Congress, undertook to frame a Constitution for itself. In the distribution of the powers of Government between three Departments, Legislative, Executive and Judicial, the influence of Montesquieu is manifest. The Framers had been educated in the harsh school of experience to a practical application of the best political philosophy of their day. They were ready for their tasks.

Franklin participated very actively in the drafting of the first Constitution of Pennsylvania—that of 1776. It was never adopted by a popular vote, and is, as compared with later instruments, a crude piece of work. The same remark may be predicated of the earliest State constitutions adopted elsewhere.

We have as the result of the labors of the statesmanlike law givers of the period from 1775 to 1787, two distinct bodies of Constitutional literatures which became the basis of that overshadowing Department of American law known as *Constitutional Law*—divided into *The Constitutional Law of the States*, and the *Constitutinoal Law of The United States*. In some respects they are similar, especially in the features of what may be termed Personal Rights or Liberties. In others totally dissimilar. The radical distinction is this: As each State was in itself a sovereign, the Legislative power of each State is absolute like the omnipotence of Parliament, save where expressly or by fair implication restrained by Constitutional restrictions. On the other hand, as the Nation was the creation of The People of The United States, legislative powers are but delegations of authority, and cannot exist except where expressly conferred, or can be fairly implied from express grants. Hence, National powers exist only where the warrant for their existence can be found in the text of the Constitution of The United States, or is deducible by fair argument from express powers. State powers exist inherently except where expressly or impliedly denied by the State Constitution. No such distinctions can exist in England, as the British Constitution is not a written intsrument. It follows that it is a unique feature of American Jurisprudence that every statute, whether State or National, is to be judicially tested according to the provisions prescribed in our written instruments of organic law.

It is true that the imposing edifices erected upon the foundations laid in Franklin's day have been extended to such vast proportions as to bewilder the contemplative observer, but the secret of their strength lies in the depth and breadth of view of men who knew how to avail themselves of the lessons and material achievements of the past. Successful governments have never been the products of pure theory. The most distinguished of truly beneficent reformers, while fiercely assailing entrenched evils, have never scorned to study human nature, or vain-gloriously proclaimed their schemes as essential to the happiness of mankind. They never concocted quack remedies or dealt in legislative panaceas.

All earnest students of our institutions know well that all public documents, whether charters, constitutions, legislative acts or judicial decisions are but expressive of political ventures, following but never preceding ripened public opinion. When embodying plans of government they have had a history. All grants, as well as limitations of power, if explored, can be traced to sources more or less remote. Such documents have respectable ancestors. However striking their characteristic features may be, they are never strictly singular, but bear the marks of their relationship. Moreover, if their objects be similar and they follow each other at appreciable intervals, they display in their variations an enlargement of ideas, and a progressive scale of thought. The biographies of those particular instruments which have played a leading part in the establishment or development of our present institutions constitute an interesting as well as instructive chapter in the history of our legal growth since the days of the Junto.

The next structure commanding attention constitutes a vast department of substantive law, knowing no bounds of latitude or longitude but reaching, both in the making and in performance, the utmost ends of the globe. It embraces the multifarious activities of men in a distinctly commercial age and business life in all its aspects. It is comprehensively known as *The Law of Contracts*.

Its area is wider than any other department of the law, for apart from the preservation of the peace through the exercise of the police power, and the adjustment of private wrongs known as torts, the greater part of the work of government, as executed by Courts of Justice, consists in giving sanction to those engagements between men which rest upon that general expectation of good faith which prevails among all people of average right mindedness.

While the conception of Contract was of ancient origin, appearing in the Institutes of Manu, in the Bible, and in that great body of classical jurisprudence known as the Civil Law which Rome brought to the highest pitch of perfection in the fifth century, and which penetrated England in the days of Bracton in the thirteenth century, yet it was not until England became a commercial nation that the law of contracts emerged from a rude and crude condition. In *Ancient Law* Sir Henry Maine asserts that: "At first nothing is seen like the interposition of law to compel the performance of a promise." And the same learned author has elsewhere asserted that "the Society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract." The great forward movement in its awakening from the sluggish sleep

of centuries, guided by the master mind of Lord Mansfield, began during the latter part of the life of Franklin, and has been since taken up and carried onward by American jurists at a constantly accelerating pace.

It will be understood that by the word *Contract* is meant *such an agreement as the law will enforce*, for it is well known that it is not every agreement that is enforceable, nor is it every promise that is binding. An agreement which is the result of force, or fear, or fraud, or mistake, or which springs from a mind diseased, or one enfeebled by age or infancy, or which has an immoral or illegal purpose, or is contrary to public policy, or in contravention of either constitutional or statutory law, will never receive the sanction of a Court of Justice.

With these limitations, an hour's reflection or a month's actual experience of life will satisfy any one that civilized Society could not exist without implicit confidence between men in their dealings with one another. When we say that a man's word is his bond we signify, in striking though not technically exact language, that legal as well as moral consequences flow from plighted faith between individuals, whether the pledge be oral or written as in the case of express contracts, or implied from acts or conduct which often speak louder than words.

To-day every act which does not involve a crime or a tort involves a contract.

Sir William Jones, as great as a lawyer as he was as an Orientalist, in his exquisite and scientific "Essay on Bailments," said: "There is hardly a man of any age or station who does not every week, and almost every day, contract obligations, or acquire the rights of a seller and buyer, or a hirer or letter to hire, of a borrower or a lender, of a depository or a person depositing, of a commissioner or an employer, of a receiver or a giver in pledge. Nor must it ever be forgotten that the contracts above mentioned are among the principal springs and wheels of civil society; that if a want of mutual confidence, or any other cause, were to weaken them, or obstruct their action, the whole machinery would instantly be disordered or broken to pieces."

To this impressive statement let me add that of Professor Sheldon Amos, in his work on "The Science of the Law":

> The purpose of the law of contracts is to impart stability and security to certain temporary relationships with one another which men spontaneously frame for themselves. The relationship of two contractors differs from the relationship of family life in the spontaneity which originates it, and in the freedom which the parties enjoy for the purpose either of describing or modifying its terms, or of annulling it altogether. Thus the essential quality of the relationship implied in contract is freedom in respect of its original creation; in respect of the description of its nature and of its terms, and in respect of the mode and period of its conclusion. The real policy which dictates a law of contract is that of giving the same reality and consistency to the groups which evolve themselves through the play of social and economic life as primitive law gives to those groups, of which gradual formation is the indispensable condition precedent to the very existence of national life.

Paley, in his work on "Moral Philosophy," in a chapter headed with the direct and striking question—*Why am I obliged to keep my word?*—analyzes the sources of an obligation to perform promises. He says:

> Men act from expectation; expectation is, in most cases, determined by the assurances and engagements which we receive from others. If no dependence could be placed on these assurances, it would be impossible to know what judgment to form of many future events, or to regulate our conduct with respect to them. Confidence, therefore, in promises is essential to the intercourse of human life, because without it the greatest part of our conduct would proceed upon chance; but there could be no confidence in promises if men were not obliged to perform them. The obligation, therefore, to perform promises is essential to the same ends and in the same degree.

Dr. William Whewell, in his "Elements of Morality," gives expression to the same thoughts. He says:

> We have already spoken of the necessity of mutual understanding and the consequent necessity of the fulfillment of promises as one of the principal bonds of Society. The necessity of dependence upon the assurance made by other men gives birth to the right in the person, to whom the assurances are made. A person has, under due conditions, a right to the fulfillment of a promise. The law realizes this right, and must therefore define the conditions. The mutual assurances which the law undertakes to enforce are called "Contracts."

Now compare this language with that of Sir Frederick Pollock in his "Principles of Contracts," and see how thoroughly the jurist agrees with the principles enunciated by the moralists:

> "The law of contracts," says Sir Frederick, "may be designated as the endeavor of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average rightmindedness. Accordingly, the most popular description of a contract that can be given is also the most exact one, viz.: that it is a promise or set of promises which the law will enforce. The specific mark of a contract is a creation of a right, not to a thing, but to another man's conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had already expressed a certain intention, but because he so expresses himself as to entitle the other party to rely on his acting in a certain way."

The principle is judicially stated by Lord Blackburn in Cornish *v.* Abington, 4 Hurlston & Gordon, 549:

> If, whatever a man's intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

Chief Justice Marshall, in Ogden *v.* Saunders, 12 Wheaton, 341, said:

> A great mass of human transactions depend upon implied contracts, upon contracts which are not written, or which are not spoken, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, just and fair men, they ought to have made.

Lord Esher, while Master of the Rolls, said, in Ex parte Ford, 16 Queen's Bench Division, 307:

> Whenever circumstances arise, in the ordinary business of life, in which, if all persons were ordinarily honest and careful, one of them would make a promise to the other, it may be properly inferred that both of them understood that such a promise was given and accepted.

It is clear then that the basis of judicial action rests on a fusion of ethical, utilitarian and practical considerations and that the legal answer to Paley's question, Why am I Obliged to Keep My Word? must be, because public and private interests demand it. These principles have been enforced by judges whose independence is the fruit of one thousand years of struggle, who, with very rare exceptions have faced the frowns of power, the influence of corporations, or the vengeance of the mob, "be that mob the upper ten thousand or lower." Chancellor Kent long ago remarked that "law reports were worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners

of the age in which they are composed. Law reports are dramatic in their plan and structure. They abound in pathetic incidents and displays of deep feeling. They are faithful records of those competitions, factions and debates of mankind that fill up the principal drama of human life."

Enough has been presented to illustrate the manner in which, since Franklin's day, English and American jurists have expounded and applied principles which underlie and control our daily actions. Let me now bring home to the minds of my lay hearers a realization of the extent to which they themselves have become involved within the last week. Those of you who have come from a distance, either to deliver or to listen to addresses during the celebration of this notable Bicentennial Anniversary of the formation of Franklin's Junto, had to rely on the punctuality and exact performance of hundreds of contracts, both express and implied. Apart from your personal contracts with the Railroad Companies embodied in your railroad tickets, you had to rely upon contracts to which you were not parties—upon contracts made between connecting roads for the conveyance of cars according to the time tables. The railroads relied upon the contracts made with car and locomotive builders, as well as with the train crews—with the engineers, firemen and brakemen. They relied on the contracts made with track walkers, section men, telegraph operators, switch tenders, yard men and watchers in signal towers. All of them relied on the contracts made with miners for the supply of coal, and these in turn relied upon contracts for the supply of food, clothing and proper tools, as well as air supply and safety contrivances. It is true that performance in every case was guarded by the possible consequences of negligence in the performance of a duty, but the duties to be performed sprang out of contracts.

Let me extend the outlook. Credit is everywhere the corner stone of human enterprise. The man without credit is useless and helpless. He is not simply dishonored—he is a business paralytic. Multiply the individual whose word no man can trust by the sum total of the community, and the result would be chaos. Strike out of existence the single contract of Insurance, with its five-fold aspects of fire, marine, life, accident, and health policies, and cities would cease to be built, ships would disappear from the sea, and human life would be full of an agony of apprehension which would visit bodily mutilation, sickness and approaching death with terror. Strike down the faith in commercial promises which enables banks to discount paper, and business is at end. Strike down faith in corporate obligations of any form, and collaterals would shrivel into waste paper, and millions of men and women would become insane beggars. Undermine confidence in the undertakings of government, and national prosperity would vanish in the air. Extend these consequences to the limits of the globe, and civilization would be annihilated.

The curtain rises upon a vast scene, but we can spare time for but a single glance. *International Law,* like a distant sun, "swims into our ken." In Franklin's day the only writers of note—and they were then but little known—were Grotius, Puffendorf, Vattel and Burlamaqui. With the opening of the nineteenth century Sir William Scott, later and best known as Lord Stowell, was deciding questions of maritime law, especially in cases of prize arising out of the Napoleonic wars; to be followed by Marshall, Story and Bushrod Washington in dealing with similar questions springing from our War of 1812. During and after our Civil War a similar service was rendered on a far broader scale by Taney, Chase, Waite, Miller, Bradley and Field, especially defining the meaning of the phrases *The Rights of Neutrals* and *Contraband of War.* Then came an impressive body of Jurisprudence, distinctly American, composed of judicial decisions, the text of treaties, the papers of our Secretaries of State, the opinions of Attorneys General of the United States, commented on and digested by Wheaton, Lawrence, and our distinguished fellow member, John Bassett Moore, and Charles L. Hyde. It is not too much to say in this presence that Judge Moore is everywhere regarded as the Grotius of the present.

I turn now to the *Law of Torts,* those private or civil wrongs which, though not amounting to crimes, involve injuries for which compensation must be made. They consist in breaches or violations of duty, which may spring from contracts or quasi contracts, or from such relationships as impose the obligation of the exercise of care not to injure one's neighbor in the manifold relations of life. It is largely of modern growth, and has reached vast proportions. The surgeon, the physician, the dentist, the lawyer, the nurse, the druggist, the manufacturer, the builder, the employer of labor, the common carrier, all public service corporations, telephone, telegraph, heat, light and power companies, the public press, the citizen driving his own car, and municipalities are all subjected to its sway. Professional men must possess and exercise that degree of knowledge, of judgment, of skill and of care which they profess to possess by holding themselves out as members of learned professions. The manufacturer and employer of labor must furnish to his workmen safeguards to machinery, proper tools, and reasonably safe and sanitary situations in which to labor: builders must underpin adjoining foundations, guard sidewalks from falling materials, and be answerable to their workmen for the consequences of the negligence of co-employees. Common carriers must give their passengers safe conveyances and reasonable time in which to enter or leave vehicles before starting, and take precautions against collisions on rails or streets by proper brakes, and the observance of signals. Ships must load, stow and discharge cargoes with due care, observing both on the open sea and in port the rules of navigation. Newspapers must refrain from libels. Citizens must obey speed regulations, and respond in damages for assaults and batteries, deceit, slander, malicious prosecutions and conspiracies, and cities should not permit holes in the highways to menace travel. It is needless to multiply illustrations.

The doctrines of the law are covered by the general term *Negligence,* or an absence of due care. There is and can be no hard and fast rule. Every case must be judged of by its special circumstances. Negligence is either of commission or omission—the not doing of that which a man of ordinary prudence, under the circumstances, would attempt, or the omitting to do that which every man of

average prudence would do under the circumstances.

If I may be pardoned an attempt to state it in briefest form the rule would be: To know what to do, and to do it; to know what not to do and to refrain.

In dealing with *prudence* there must be considered the advance of science, learning, art and mechanics as applicable to the particular locality in which its exercise is attempted. Circumstances must be considered. What would be clear negligence in one case, may not be avoidable in another. A well equipped hospital in a large city, for instance, differs from conditions prevailing in a small hamlet in testing a charge of malpractice against a surgeon, and the case of a motorman prevented by surprise from applying the brake in time to avoid running down a child darting suddenly from a narrow alley in front of his car, differs from the recklessness of uncontrolled speed in a crowded block.

The severity of the rule in exacting care is tempered by the doctrine of contributory negligence. The mere happening of an accident is not *per se* evidence that the injury was the result of the carelessness of the party sought to be charged. The injured person must be free from blame in having been equally at fault by inviting danger through his own negligence. "Stop, Look and Listen"—a pregnant phrase—is not confined to a railway crossing, but is applicable in principle to all situations in life. The closest attention to the facts, and the nicest considerations of the equities of cases are required of judges in charging juries or in controlling verdicts. These doctrines in Franklin's day were but little known, as the occasions for their application did not exist.

I now turn to *Crimes and their Punishment*. In no department of the Law have more remarkable changes taken place, during the past two hundred years. The most comprehensive division of crimes is into Felonies and Misdemeanors. Lord Coke, writing in the days of James I., named but eight felonies as existing at Common Law; that is by customary law, irrespective of statute, or by act of parliament. These crimes were treason, homicide (in its two forms of murder and manslaughter), rape, burglary, arson, robbery, theft and mayhem. Statutory felonies were so numerous that Lord Coke did not attempt to enumerate them.

Misdemeanors were crimes of less dark a dye, embracing all the lower grades of crime, from assaults and batteries to perjury and libel. But few of them existed by custom, and their number grew from century to century.

In addition to these there were many offences falling within one class or the other by special legislative enactment.

The punishment attached to all felonies, where the offender could not claim the benefit of clergy, was death by hanging, forfeiture of lands and goods and corruption of blood or attainder. Benefit of clergy was an exemption from temporal punishment on the ground that the offender was in holy orders, of which the test in early days was the ability to read a text of Scripture. The benefit of clergy was not permitted to treason nor to misdemeanors, and in the former the death punishment was added to by the sentence that the felon should be drawn and quartered. The phrase "felony without benefit of clergy" practically meant a crime punishable by death.

Punishment for misdemeanor was sometimes by death, more commonly by fine and imprisonment, sometimes by transportation for life or years.

Without delving too deeply into antiquity it is sufficient for my present purpose to state that in Saxon times human life was rarely forfeited as blood could be atoned for by money, and each man, according to his station, had his price. But as time went on, and benefit of clergy became established, the crime of murder went unpunished except by a branding in the thumb of the letter M for the purpose of identifying the recipient of the benefit, while the thief, who had no money, or who was illiterate, was hanged. This led to fraudulent impositions, by teaching a prisoner to recite a text of Scripture which he pretended to read from the Bible handed to him. Nor could the benefit be claimed by women, who were incapable of holy orders. Then came a gradual withdrawal of the benefit from the graver felonies. This was followed by the creation of new felonies without benefit. And so the death list grew.

It was by the creation of new felonies without benefit of clergy that the severity of the Criminal Law was greatly increased all through the eighteenth century.

In the second edition of the "Commentaries" published in 1769, Sir William Blackstone says that "among the variety of actions which men are daily liable to commit no less than 160 have been declared by Act of Parliament to be felonies without benefit of clergy."

The true explanation of this astonishing number of crimes existing in the days of Franklin as contrasted with the fewness in number in former years is not because our ancestors led purer or better lives in past centuries than in the times of Franklin. The phenomenon is explained by the circumstance that one generation never repealed the laws of their predecessors, and so the mass went rolling on from century to century, augmenting in bulk, black with terror, heart-sickening in its atrocities.

The bigotries of Kings, the avarice of Queens, the ambitious plans of the Nobles, the fanaticisms of the Clergy, the selfish pleasures of the rich, the jealousies of land-owners, the greed of jailers, and the interest of scheming monopolists alike demanded victims, and cried out for blood.

The following are some of the offences which English Kings and Queens, Lords and Commons thought worthy of the death penalty: Maliciously to burn stacks of corn, or kill cattle in the night; to personate bail; to counterfeit lottery-tickets, stamps, exchequer bills; to blanch copper and mix it with silver; wilfully to destroy any ship; to assault a privy counsellor in the execution of his office; to steal a pump from any ship; to burn any any wood or coppice; to return from transportation; to take a reward for the recovery of stolen goods; to tear, spoil or burn the garments of any person in the street or to engage in smuggling.

The Black Act in the year 1736, which was some nine years after the formation of the Junto, added to the list: To appear in disguise in any forest, path or heath, and wound or kill deer; to

rob any warren of rabbits; to steal fish out of any river or pond; to cut down a tree in any avenue or orchard; to set fire to any house or barn—these acts were punished by death; to send threatening letters, anonymous or signed by fictitious names, demanding money, venison or other valuable thing; to break down the ledge or mound of any fish pond, whereby the fish might escape; to damage Westminster Bridge; to enlist in the service of any foreign prince without his Majesty's leave; to steal sheep or cattle; to steal linen, fustian and cotton goods and wares from bleaching fields; to cut or destroy velvet in the loom; or to destroy any tools used in the weaving of velvet; to forge any debenture bond relating to the duties of excise upon beers, cider and hides; and the drawbacks on wines and ales; to steal from the person to the value of five shillings—all these were punished by the dreadful penalty of death.

Yet, this was the England of Hale, of Addison and Pope, of Burke and Wilberforce, and Hannah More!

In the year 1810, Lord Holland in a Debate in the House of Lords, declared that no less than 234 offences were punishable by death.

I have not had the opportunity of verifying this count.

In 1763, frequent mention is made, in the books, magazines and newspapers, of bodies of malefactors, conveyed after execution to Black Heath, Finchley and Kennington Commons or Hounslow Heath, for the purpose of being there permanently suspended.

"In those days," says Charles Knight in his "History of London," "the approach to London on all sides seems to have lain through serried files of gibbets, growing closer and more thronged as the distance from the city diminished, till they and their occupants arranged themselves in rows of ghastly and grinning sentinels along both sides of the principal avenues. And, by way of a high temple of the gallows, in a central point toward which all these ranges might be supposed to converge, stood Temple Bar with its range of grinning skulls, beneath which, when the gory heads were first stuck up, Horace Walpole saw the industrious idle of the city lounging with ample store of spy-glasses, through which passengers were allowed to peep at them for the small charge of one-half-penny."

Whole counties were covered by the gibbeted remains of human beings, the air was poisoned by the stench of rotting limbs, and belated travelers, hurrying over the heaths, were startled at each lonely cross-road by swaying bodies hung in chains and glistening in the moonlight with ghastly horrors.

In the year 1816, at the very time when Sir Samuel Romilly was pleading for the repeal of sanguinary laws, there was a child in Newgate prison, not ten years of age, under sentence of death for stealing an article in excess of the value of one shilling. The Recorder of London was reported to have said that "it was intended to enforce the law strictly in the future, to interpose some check, if possible, to the increase of youthful depravity."

English conservatism was strangely stubborn, and resisted for years all movements of reform. The scalding tears and flowing blood of thousands of unhappy victims had failed to thaw the frozen heart of justice. I have not the space within the limits of this paper to trace the history of the amelioration of the criminal code. Humanity finally triumphed; the self-sacrificing labors of Howard, the caustic wit of Sydney Smith, the eloquence of Brougham, the white-souled philanthropy of Romilly, and of Sir James Scarlet, later Lord Abinger, acting on the quickened intelligence and sensitive conscience of the nineteenth century, prevailed at last, and this barbarous code, with all its attendant horrors, passed into history, fit only to be compared to that regulation of the Inquisition which denied to suspected heretics the assistance of the law.

This result was attained but slowly—the advances being made chiefly during the reigns of George IV., William IV., and Victoria. It was not until 1861, by a general consolidation of criminal Statutes, that punishment by death was confined to treason, murder, piracy with violence and setting fire to dock-yards and arsenals. The curious student can trace the steps through the History of the Criminal Law of England by Sir James Fitzjames Stephen.

In Pennsylvania a far milder condition prevailed. This was due to the resolutely benevolent humanity of Penn, and also to the circumstance that life was free from those complexities which legislative bodies are prone to consider as calling for correction and restraint by penal statutes. Penn was the noblest, the boldest and the most immediately successful law reformer of the Anglo-Saxon race. He accomplished, at the outset, what it took England two hundred years to obtain. He was favored by having a virgin territory in which to try out his Holy Experiment. He encountered no entrenched interests, and, under his charter, was invested with ample powers. He had, it is true, to have the approval of the freemen of the Province in securing laws, but he had sagaciously agreed in England with his first purchasers upon a series of laws, which were enlarged and ratified upon his arrival at Chester. At a single stroke of his pen he struck off all the sanguinary punishments of his parent country respecting felonies, substituting, in lieu of death—save as to the one crime of murder in the first degree—temperate imprisonment and hard labor, and declared that "all prisons shall be work houses." He was unable, however, to hold his ground. His prolonged absences from the Province, the opposition of the Privy Council to many of his regulations, the veto by the Crown of many of his statutes, the appearance of turbulent characters, the outgrowth of interests conflicting with the public peace thwarted his intentions. He was too far in advance of his time, and marked recessions took place.

Pirates appeared in the Delaware, smugglers violated the revenue laws, forgers and clippers of the coin were active; burglars, incendiaries, ravishers, and thieves, no longer dreading death, plied their nefarious trades. And so it came about that under the Act of 31st May, 1718—the very year in which Penn died—all through the days of Franklin, the death penalty was attached to high treason, including all those treasons which respect the coin; petit treason, murder, robbery, rape, unnatural of-

(*Continued on page 56*)

U. M. ROSE: TWENTY-FOURTH PRESIDENT OF THE AMERICAN BAR ASSOCIATION

Early Professional Career in Arkansas—Prepared First Digest of State Reports—Declines Legislative Tender of Seat in U. S. Senate—Important Litigation in Which He Appeared—Wide Range of Intellectual Interests—Appointed as Representative to Hague Peace Conference—Foreign Travel—Translation from the German*

By George B. Pugh
Member of the Little Rock, Ark., Bar

THIS is written in the Rose Room of the Little Rock Public Library. Near the southeast corner of this room hangs a portrait of Judge U. M. Rose, and over the fireplace in the south end is a bronze tablet bearing the following inscription:

THIS ROOM IS DEDICATED TO THE MEMORY OF
U. M. ROSE
BORN MARCH 5, 1834—DIED AUGUST 12, 1913
WHOSE LIBRARY IT CONTAINS
PRESIDENT OF THE AMERICAN BAR ASSOCIATION
AND AMBASSADOR TO THE HAGUE PEACE
CONFERENCE,
HE WAS ONE OF THE NATION'S GREATEST
LAWYERS.
HE WAS DISTINGUISHED FOR HIS PUBLIC AND
PRIVATE VIRTUES,
FOR VAST AND VARIED LEARNING, FOR THE
FELICITY OF HIS DICTION,
AND BY A CHARM OF MANNER THAT WON THE
HEARTS OF MEN.
HIS WIFE, MARGARET T. ROSE, WHO WAS HIS
WORTHY COMPANION,
DONATED HIS LIBRARY TO THE PUBLIC.

The four sides of the room, which is thirty by fifty feet, are lined with books from his private library, and there are three cases, ten by six, in the north end of the room, all filled with books—seven thousand volumes in all—and there hardly seems to be a book among them which has not been read, and not only read, but used. Among these books are over fifteen hundred in French and a large number in German. These two languages he spoke fluently.

He spent the better part of his life accumulating and reading the books in this room. Many of them are exceedingly rare and would sell for fabulous prices to collectors of rare books, but the fact that he had these in his library was purely accidental. He was no bibliophile. He bought books to read and not to fondle and display. How he could find time, amidst a busy law practice, to read all these books and to master two foreign languages, for he had none of this at school, was a mystery to his friends, although it was well known to them that he read very rapidly. The profession of the law has always been considered a jealous mistress, who refuses her favors to him who attempts to divide his affections, but Judge Rose was an exception to this rule. He was able to shower his attentions upon the languages, history, philosophy, romance, biography, travel, art, and even poesy, and still receive all the favors that she had to bestow.

He came to Arkansas from Kentucky, his native state, and began his professional career at Batesville when just twenty years of age. The entire state of Arkansas at that time did not contain a population exceeding one hundred thousand and Batesville then was a small and crude village, but he always referred to it as an exceedingly pleasant place to live. There was not a railroad in the state and all the practice he did outside of Batesville had to be done under the most adverse circumstances. He had to ride horseback a hundred and twenty-five miles to reach Little Rock, the state capital, but he always rode it in two days, which was unusual speed. When he was twenty-six years old, he was appointed chancellor of the chancery court held at Little Rock, the only chancery court in the state. Its jurisdiction in some matters was coextensive with the state. Judge Rose continued to reside at Batesville for two years after he received this appointment and then, when Little Rock fell into the hands of the federal troops during the Civil War and the capital was transferred temporarily to Washington, Arkansas, he moved to the latter town and resided there until the end of the war.

At the close of the war he was out of office and removed to Little Rock and formed a partnership with Judge Watkins, formerly chief justice of the state and a very accomplished lawyer. This partnership continued until Judge Watkins' death, in 1872. The firm had a very large practice from the beginning.

There were then twenty-three volumes of the reports of the decisions of the Arkansas Supreme Court and no digest. So, immediately upon resuming the practice, Judge Rose entered upon the work of digesting these reports and finished this work and published his digest, known as Rose's Digest, in 1867. It was a splendid work, the first of its kind in the state, and gave him a great reputation among the lawyers. At this period of time a few lawyers at Little Rock did nearly all the practice in the Supreme Court, and the reputation which Judge Rose had made by his digest, and that

*This article was prepared by Mr. Pugh at the request of the Editor-in-Chief of the American Bar Association Journal.

of Judge Watkins as a former chief justice of the Supreme Court, gave their firm a large share of this practice. They appeared on one side or the other of nearly every important case and their practice became quite lucrative.

Soon after he opened his office in Little Rock, what is known as the carpetbag rule began in Arkansas. It would be inexcusable to define for Arkansas lawyers the term "carpetbag rule," but since this article is written for lawyers all over the United States, it may be proper to state that this was the darkest period of Arkansas' history. Conditions during the war were contentment and happiness compared to it. The political leaders were strangers to our people—the backwash of an invading army—having no sympathy with our traditions and no patience with our weaknesses. The more complete the change which they brought about in our institutions, the better they were pleased. Our former slaves were by them made our masters, being placed upon our juries to pass upon our controversies and studiously taught that they were our equals, if not our superiors. This was intolerable, and yet it had to be tolerated.

But these changes brought one blessing—all the technicalities of common law pleading were swept away and code pleading was established in Arkansas. Judge Rose had been a skilled common law pleader and along with other such lawyers had thus won many victories in court over the unskilled lawyers of that day. Many of the best lawyers resented the simplifying of our practice, which, they said, placed a premium on ignorance. They were called the recalcitrants. Judge Rose was not one of these. He was far too good a lawyer and much too good a man not to welcome any change which made it easier for a litigant to obtain justice in the courts on the merits of his case. Moreover, the simplicity of code pleading fitted in quite well with his fine diction and clearness of statement, and he became at once one of the finest code-pleaders.

The carpetbag rule was ended with the episode known in Arkansas history as the Brooks-Baxter War. Brooks, a carpetbagger from Ohio, and Baxter, a former justice of the Arkansas Supreme Court, had opposed each other for the office of governor at the general election in 1872. Brooks had the support of the Democrats and probably received the most votes, but the carpetbag legislature considered Baxter better for their designs and declared him elected. He immediately took the oath of office and entered upon the discharge of his duties, but his independent course of action displeased the Republican leaders, who were in charge of all the departments of the state government, and they decided to oust Baxter and put Brooks in office. In attempting to accomplish this they resorted to arms, and the result was the Brooks-Baxter War.

Judge Rose had known Judge Baxter when they both lived at Batesville and had a high regard for him. Moreover, his acumen as a lawyer caused him to realize the advantage resulting from the action of the legislature in declaring Baxter elected. However, they all knew that the final decision must be made at Washington and that a man of great judgment and tact must be sent there to present the matter to President Grant. Judge Rose was chosen for this mission, and it was largely through his consummate diplomacy that the President was induced to decide in favor of Baxter.

This was the end of carpetbag rule, and as the result of his valuable services to the people in this critical period, the legislature, in 1877, tendered Judge Rose the office of United States senator from Arkansas, but he declined. The burdens and responsibilities of public office did not appeal to him and he accepted few of the many commisisons which were tendered him and none where he did not feel that acceptance was absolutely necessary for the good of his people. He served upon the commission of three to straighten out the tangled finances of the state which had resulted from the terrible misrule of the carpetbag government, and this office he filled with his usual ability but without any reward save the consciousness of duty well performed.

The first very important litigation in which he was engaged after he opened his office in Little Rock involved the title to nearly all of the land upon which the City of Hot Springs is now situated. Hot Springs had become a considerable town at that time and by reason of its peculiar location, in a narrow valley, in which all of the springs of hot water are located, the land had become exceedingly valuable. Henry M. Rector, a former governor of Arkansas, Mr. Gaines, a prominent citizen, and a man by the name of Hale each claimed ownership to the land and each had possession of a portion of it. Judge Rose represented Mr. Gaines, but after some investigation he concluded that none of the claimants could establish title to the property and that it all belonged to the Government. He, therefore, urged them most earnestly to agree to a partition among themselves before the Government should intervene, but they were all very obstinate men and no agreement could be brought about. Finally, the Government brought suit against them and prevailed (Hot Springs Cases, 92 U. S. 698). In this litigation General Albert Pike, another great Arkansas lawyer of that period, represented Rector, and this is the case he referred to when he wrote in his autobiography many years later that he would have had money enough to publish his work on the maxims of the Roman and French law "if the Supreme Court of the United States had not, in violation of all law and justice, deprived Henry M. Rector of the hot springs to which he had as good a title as I have to the pen that I am now writing with."

However, after this decision, which completely upheld the opinion of Judge Rose, Congress passed an act which gave the right of purchase at a nominal price to those who were in actual possession of the land, and in the litigation which ensued under this act Judge Rose succeeded in getting the United States Supreme Court to hold that this case was no exception to the rule that the possession of the tenant was the possession of the landlord, and since nearly all of the land was being held under lease from one or another of these parties the final result was that they got nearly all of the land for a nominal consideration (Rector vs. Gibbon, 111 U. S. 276, Goode vs. Gaines, 145 U. S. 141, and Gaines vs. Rugg, 148 U. S. 228).

Another very important case which Judge Rose had in the United States Supreme Court resulted from the effort of Jay Gould to obtain control of the Memphis & Little Rock Railroad. In this liti-

gation Judge Rose represented the bondholders and succeeded for them in circumventing a very cunning scheme devised by Gould for getting control of the property without paying anything to the bondholders. The principal decision in this litigation was Dow vs. Memphis & Little Rock Railroad, 124 U. S. 652.

Probably his most notable case from the standpoint of the number of local people interested was that of United States vs. Beebe, reported in 127 U. S. 338. Some parties making a claim to the land upon which the City of Little Rock had been built prevailed upon the attorney general of the United States, Mr. Brewster, to bring a suit in the name of the United States to set aside patents to substantially all of the land upon which the city had been built. Their claim had been ignored for almost a hundred years, and it seemed very strange that they were able to get the attorney general of the United States to attempt to have it upheld. Judge Rose became convinced that the attorney general had abused his high office in bringing this suit, and so his sense of propriety was outraged. In these circumstances his duty to him seemed plain and he did not shirk it. His strictures upon the conduct of the attorney general in the brief which he filed in the United States Supreme Court are a fine example of that boldness which he possessed, when the necessities of the case demanded that high official position should not exempt from criticism a man who had abused his official power. The result of the brief in this case was that Congress passed an act limiting the time within which suits could be brought by the United States to set aside its patents.

It is said by an eminent lawyer of the Cincinnati bar that on one occasion Mr. Justice Stanley Matthews, a resident of that city, upon returning home after his first year upon the supreme bench and being asked who was the ablest lawyer that had appeared before that court, replied: "The ablest lawyer did not appear in person but filed a brief. It was U. M. Rose of Arkansas." It is thought that this reference was to the brief filed by Judge Rose in Hardin vs. Boyd, reported in 113 U. S. 756.

Judge Rose was a sagacious business man as well as a great lawyer. When the State Constitution of 1874 was adopted the limit of taxation was so narrow that it seemed almost impossible for any municipal improvements to be made without payment in cash therefor, which was practically impossible. To obviate this difficulty, Judge Rose prepared the act for improvement districts in cities and towns, which was passed by the Arkansas legislature, and he succeeded in getting the act upheld in the case of Fitzgerald vs. Walker, 55 Ark. 148. This act probably was of more benefit to the cities and towns in the State of Arkansas than any other act ever passed by our legislature. It has been used as a model for nearly all local improvement statutes enacted since that time.

Lord Bacon, when thirty-one years of age, wrote his uncle, the great Lord Burghley, "I have taken all knowledge to be my province." Judge Rose's modesty would not have permitted him to write that of himself, but his friends may very properly say of him that he took all knowledge to be his province. He studied the civil law and wrote and published articles on "Some Controversies of Modern Continental Jurists." He studied philosophy and wrote informing essays upon it. He studied the classics and knew them thoroughly. He studied the sciences and kept up with all the discoveries of science and the resulting inventions. He read all history, and there was nothing of importance recorded with which he was not familiar. He read most of the poetry and romances that had been written in the languages he understood, and his translations of French and German poetry, while not voluminous, manifest marked poetic genius. He read all the worthwhile books of travel. He made a thorough study of the French bar, and one of his most delightful addresses was one on "Trial by Jury in France," delivered before the Missouri Bar Association in 1900.

JUDGE U. M. ROSE

In addition to his extensive reading and professional work, he took a keen interest in political affairs and was chairman of the Democratic state central committee for years. He headed the Arkansas delegation to the national convention which nominated Grover Cleveland for president the first time. The alphabetical position of his state placed it near the head of the list, and as the vote was taken again and again he cast her entire vote for Cleveland and thus exerted a considerable influence in bringing about his nomination. He was frequently called upon to deliver addresses, particularly before bar associations, and was generous in

his acceptances, so that he addressed bar associations in many of the states, east and west, throughout the country. All of his addresses were carefully prepared and nearly all of them published and distributed among his friends. A few of them have been collected and published, in a volume edited by George I. Jones, of Chicago, and they make delightful reading, especially for lawyers.

A partial list of his published addresses shows the wide scope of his endeavors, and a study of them shows the depth and variety of his learning. In 1882 he read before the American Bar Association a paper on Titles of Statutes, and in 1893, on Trusts and Strikes. In 1896 he delivered an address before the Virginia Bar Association on Law Reform —Coke and Bacon. In 1901 he read a paper before the Pennsylvania Bar Association on The Rise of Constitutional Law. On the one hundredth anniversary of the birth of Lincoln he delivered an address in New York City on Abraham Lincoln. At the second Hague conference he delivered an address on Immunity from Capture of Private Property at Sea in Time of War. This address was prepared in French, but upon the insistence of one of his fellow American ambassadors he translated it into English and delivered it in that language, another instance of his modesty, for he spoke beautiful French and would have charmed his hearers by his perfect pronunciation; but out of consideration for this American ambassador, who could not speak nor understand French, he delivered the address in English. It is said that Judge Jeremiah S. Black, one time chief justice of the Supreme Court of Pennsylvania, attorney general of the United States, and secretary of state under President Buchanan, in introducing Judge Rose on the occasion of one of his addresses, concluded his very short introduction with these words: "I now have the pleasure of introducing to you the most scholarly lawyer on the globe, Judge U. M. Rose."

In 1892 he published the Constitution of Arkansas of 1874 with annotations made by himself, and it was a most helpful work to the profession. His modest introduction to that work is illustrative of his character, and a quotation therein shows to whom he was indebted for some of the beauty of his diction. The quotation is from Dr. Johnson and appears in the introduction to the first edition of his dictionary. To my mind, as to Judge Rose's, it seems the finest excuse for the errors and misprisions that must creep into all our efforts: "Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning, and the writer will often in vain trace his memory at the moment of need for that which yesterday he knew with intuitive readiness and which will come uncalled into his thoughts tomorrow."

He was a happy after-dinner speaker, always speaking extemporaneously. His vast fund of knowledge and experience were drawn upon on such occasions with the greatest ease, and his natural wit and humor illumined all his speeches. His acknowledged leadership of the bar in Arkansas was so universal that jealousy and envy of him were unthought of, so that his popularity was unabated by rivalry. He was first, and there was no second. His crowning effort as an after-dinner speaker was at a luncheon given to President Roosevelt at Little Rock in October, 1905, when he responded to the toast, "The President of the United States." This is probably the only one of his after-dinner speeches which was taken down in shorthand and reported. It is as perfect in structure and diction as if it had been written with the most meticulous care, but it was obviously extemporaneous. It made such an impression on Mr. Roosevelt that he appointed him an ambassador to the Hague Peace Conference, along with Mr. Joseph Choate and General Horace Porter. The conference met in 1907.

While his associations at this conference, which lasted eight months, were exceptionally pleasant and agreeable, and while his reputation as a diplomat and a scholar was increased by his participation in its discussions and deliberations and on account of his perfect mastery of the French language, which was the official language of the conference, he was disappointed with the result and was heard to say on many occasions after his return that the countries of continental Europe, with the exception of France, did not desire to abolish war, but merely to regulate it, which, of course, was impossible. This was his last great work.

He was now past seventy, full of honors and in comfortable financial circumstances. So he retired from the active practice and devoted the remainder of his life to study and travel. He had always enjoyed travel and was quite familiar with Europe and the Near East. One of the stories he used to tell with a great deal of delight was that while in Constantinople on one of his numerous trips to that part of the country he was visiting a bookshop, as was his custom, and casually manifested an interest in a copy of the Koran which he found there. Immediately the shrewd Turkish book vender doubled the price of the book, so as to be able to give his American customer a large reduction and at the same time reap a rich profit for himself. But Judge Rose was not of the type the Turkish book vender had divined and soon turned away without making the purchase. Whereupon, the vender followed him down the street, entreating him to buy and reducing the price with each entreaty. Finally, when he had come down to about the regular price for it, he exclaimed to Judge Rose that his Mohammedan religion would not permit of his selling the holy book for less. As quick as a flash, Judge Rose replied that his Christian religion would not permit of his paying that much. In the end he bought the book for about half the price named by the vender as the minimum permitted by his religion. When he would tell this story Judge Rose used to express the hope that Mohammed would forgive his disciple for thus doing violence to his religion.

The legislature of Arkansas of 1915, two years after his death, by concurrent resolution ordered a statue of Judge Rose placed in the Hall of Fame at Washington. This statue, a splendid likeness, with the natural pose with which his friends are all familiar, was completed during the World War, and his widow, who was then living, refused to permit even the slight interference with our efforts to win the war that appropriate unveiling ceremonies might entail, and this action of hers was entirely consistent with the unselfish patriotism of her distinguished husband. The statue is surrounded by those of other distinguished Americans,

the pride and glory of every Arkansas lawyer, a fitting tribute to the greatest lawyer of this or any other period of her history.

Though he reached the age of seventy-nine, he was never strong or robust, and nothing short of genius made it possible for him to accomplish what he did. Probably the greatest one thing which contributed to his marvelous learning was his genius for rapid reading. He did not read words, or even sentences, but, like Lord Macauley, he had the faculty of casting his eyes over a printed page and at a glance taking in the full contents accurately, a rare gift indeed. Without this he never would have been able to read the seven thousand volumes of his library and know them as he did. Pliny tells us of a Greek, Charmidas, who could repeat from memory the contents of the largest library, but the libraries of the time of Charmidas could hardly be compared to the libraries of Judge Rose's time, and we cannot help but wonder what Pliny would say of the vast knowledge and accomplishments of Judge Rose.

I have said that in addition to Judge Rose's other accomplishments his translations of French and German poetry show that he possessed marked poetic genius, in proof of which I close this sketch with his own translation of "Abschied," from the German:

"So fare thee well thou silent house;
With saddened heart I bid adieu,
Not knowing where my way shall lie,
Still hoping peace may dwell with you.

So fare ye well, my faithful friends,
I take my leave with troubled mind;
Though fortune smile on other lands,
I'll think of those I left behind.

So fare thee well, oh lady mine;
My path from thine afar off lies;
Give me once more thy gentle hand,
Nor doubt the love that never dies.

Sleep sweetly through the dewy night
Until a better morning break;
For me no rising dawn shall bring
The morn thine eyes alone can make.

And when in other days I come,
If then I find no change in thee,
I shall be rich though Fortune frown,
For thou art all the world to me."

DEPARTMENT OF CURRENT LEGISLATION

Punishment for Crime

By Joseph P. Chamberlain

Recividism

THE treatment of the recidivist continued in 1927 to be the most interesting portion of punitive legislation. Punishment of recidivism is not a new thing,[1] but the severity of recent legislation testifies to a growing sense in the community that the character of the defendant is to be taken into consideration as well as the grade of the particular offense of which he is charged in determining the length of his incarceration. The legislatures which have acted in 1927 agree that a fourth offender is clearly a person whose right to liberty cannot be coordinated with the right of other persons to the uninterrupted enjoyment of their property and the use of their physical functions, perhaps their lives. They are not willing to leave it to the Judge to decide whether, in a particular case, there are mitigating circumstances, but permit the court only to find the fact, and then to pronounce the sentence already in effect fixed by the legislature. In 1927 this action was taken by Vermont, chapter 334; Michigan, chapter 175; California, chapter 634; North Dakota, chapter 126; New Jersey, chapter 263. In chapter 236, Minnesota has a somewhat different point of view. If the fourth offense is one for which, had it been a first offense, the person might have been sentenced to life, then he shall be given life; if it is one for which he might have had an indeterminate sentence for the first offense, then the sentence shall be an indeterminate sentence of twice the length of the term for a first offense, with life as the maximum.

California and Oregon shut out the possibility of a sentence being shortened by parole by forbidding parole in case of a fourth term.

For second and third convictions of felony there are several changes in the existing law, but here the legislator is willing to allow a wide latitude to the Judge in the length of sentence. Oregon, chapter 334, provides that in case of second or third conviction of felony, the sentence shall not be less than the longest, or more than twice the longest, term of imprisonment established by statute for the offense. Michigan, chapter 175, applies the same rule to a third offender. Minnesota tried this system, but changed it by chapter 236 by providing that if the subsequent felony is such that the sentence, had it been a first offense, would have been an indeterminate sentence, then the convict gets an indeterminate sentence, not less than twice the minimum or not more than twice the maximum sentence for the same crime. Michigan applies a different theory to third offenders whose term may be not less than one-half the longest or more than one

1. People v Gowasky, 244 N. Y. 451; Graham v West Virginia, 244 U. S. 616; McDonald v Mass, 180 U. S. 311. See South Carolina and note 45 Law Ed. 542.

and one-half times the longest statuory term for the crime for which they are convicted.

A criminal may be punished as a recidivist whether his recidivism be discovered before or after sentence. California, chapter 631, allows the amendment of the indictment or information to charge a prior conviction on order of the Court without action by the Grand Jury. After sentence, and before it is expired, the District Attorney of the county where the conviction was had, must file an information on discovering the fact of former convictions, and then the defendant must be given a trial and, if guilty, he shall be resentenced "for the sentence which would have been legal at the time of his conviction for a recidivist." Oregon, chapter 334, is the same as California, providing for resentence. North Dakota, chapter 126, is to the same effect except that the sentence is declared to be a new sentence in which credit is given for time already served. Michigan also expressly provides for a trial on information without the formality of indictment, before the judge in whose court the accused is entitled to a jury trial, and each side is entitled to five peremptory challenges. Oregon and Minnesota, chapter 236, make it the duty of prison and police officers to inform the prosecuting attorney if they learn of any previous conviction of a person whose trial is pending, or who has already been convicted.

Parole and Probation

Parole and probation are based essentially on the character of the prisoner, the probability of his "going straight" on release, so it is evident that the previous criminal record of a candidate is an element for the Judge or parole authority to consider. The legislature has given evidence of impatience with judicial and administrative leniency in this branch of criminal treatment, as it has in respect of sentences.

Probation is denied by California, chapter 770, to persons who have previously been convicted of felony, in the state or elsewhere, a decided stiffening of the act, since probation was only refused formerly in a case of prior conviction of a few very serious offenses of violence. Michigan in her Code also limits her parole law by refusing its benefits to a person who has been twice convicted of a felony, and forbids parole of any recidivist before the expiration of his minimum term of service without the approval of the Judge who sentenced him, or another Judge of the same court. The Wolverine legislature thinks that persons convicted of "robbery while armed, breaking or entering an occupied dwelling house in the night time" are clearly not deserving of a lightening of their sentences, for it adds them to the list of those not allowed parole, formerly consisting only of murderers or traitors. California takes very seriously as a test of character of the criminal and of his danger to society the fact of his being armed with a deadly weapon at the time of committing a felony, or even of his having one in his possession when arrested, for such a person is refused probation, a wide extension of the earlier statute which applied the rule only in the case of a few crimes of violence in the perpetration of which a deadly weapon was used. Judges are admonished to make probation a real factor in character building by requiring probationers to work for the public if they do not find private employment. They may be lodged in the county jail during probation or held in road camps or on farms. The tort to the individual injured by the crime, as well as the wrong to the state, may be taken into consideration by the Judge who may, in the order of probation, require the convict to apply his earnings to reparation. Obliging the erring person to consider thus his civil responsibility for his actions and his duty to provide for his family before he can use his money for his own purposes, is a plain way of impressing on him the normal requirements of life in society, which will tend towards that "reformation and rehabilitation of the probationer," which the court is instructed to keep in view.

Sentence

A specialized form of treatment of recidivism is the well known custom of treating more severely a second conviction for the same crime. This treatment may have two reasons: first, as in the case of recidivism generally, that the repetition of the same offense is evidence that the offender has become an enemy to society and should be punished as such and not as an erring member of the social order who has strayed; second, that it will be much easier to convict on a first offense if the punishment be light, while the certainty that the severe penalty is to be meted out only to a confirmed offender will render passage of the Act easier. An interesting case is the Nebraska amendment, chapter 74, of the statute punishing poultry stealing. Formerly the penalty was ten days or six months in the county jail or one to three years in the state penitentiary. The wide difference between the minimum and maximum gave judge and jury and prosecutor a chance to fit the punishment to the conditions of the offense and the character of the accused. The legislature desired to lengthen the maximum to five years, but evidently hesitated to do so and give the power to sentence for so long a term in every case. So it made a difference between first and second offenders, fixing the penalty for the first class at ten days or six months in the county jail, or up to one year in the penitentiary, and making the second offense a felony, punishable by a penitentiary sentence of from one to five years. Another instance is Rhode Island, chapter 1024, which raises the penalty for selling narcotic drugs illegally, from a maximum of one hundred dollars fine or one year imprisonment, to three hundred dollars or two years, and also on a second conviction sets a penalty of one thousand dollars or five years in prison, or both. The persistent violator who is caught for a third time is imprisoned up to ten years. The lawmaker looked with such determined enmity on the person who unlawfully possesses narcotic drugs with intent to dispose of them unlawfully that, by chapter 158, he established a minimum of five years in prison or two thousand dollars fine, or both, in place of a maximum of three years with the same limit on the fine. It is curious that the same legislature at the same session dealing with phases of the same subject should in one instance fix a minimum and allow the court such latitude to exceed it, and in the other fix a maximum, so that the court could show leniency by a very short sentence, but could not use its judgment the other way. Society, expressing its ideas through the legislatures, is not sure how far judges should be given latitude in sentencing prisoners so that, instead of the grading of first and second offenders, the minimum and maximum alone should be fixed, and the judge who hears the evidence and sees the prisoner be permitted to decide, with those limits, of the best way to deal with a particular defendant, taking into account both the defendant's own interest and that of society. A first offender may be clearly a dangerous person, the second offender may have no marks of a social enemy. Notably in the case of poul-

try stealing, it is evident that a second offense is not final proof of a dangerous character generally, while a first offense, if committed as one of an organized gang, might make a long term appropriate.

A Wisconsin statute, chapter 62, gives another reason for grading punishment. Kidnapping was formerly punished by life imprisonment. So long a term made the kidnapper indifferent, from the point of view of punishment, of the way he might treat his captive, so an amendment put a premium on his kindness by lowing the penalty to from fifteen to thirty years in the penitentiary, if "no permanent injury results" to the person kidnapped. Here a due regard for the subject of the crime caused the legislature to give notice to kidnapers by statute that their treatment before the court will depend on the treatment they give their victims. Another way of inducing a criminal to make his operations less dangerous to society is the provision put in pistol laws increasing the penalty where a crime of violence is commited when armed. Missouri, page 173, and New Jersey, chapter 321, raise the penalty by mandatory terms from two to five years, respectively, for the first offense, ten for the second, for the third, fifteen, with life for the limit, but New Jersey permits the court to give twenty years instead of life. Missouri, chapter 174, sets a minimum of ten years for robbery by means of a deadly weapon, and Washington, chapter 233, assimilates an attempt to commit a felony when armed with the completed act. California, by chapter 770, reaches the result differently by refusing probation to a convict who used, or attempted to use, a deadly weapon in committing an offense.

An amendment to the law punishing passing a check without funds to meet it, illustrates a third, and very common, form of grading the punishment. Passing a check for less than $25 is a misdemeanor by Indiana, chapter, 201, and Nevada, chapter 150. In the case of Nevada, this represents a change from $50, and the act applies the principal of severity to recidivists by providing that if the defendant had been previously convicted of a felony, passing any check would be a felony, even below $25. A very interesting instance of legislature limitation on judicial discretion is contained in the new Pennsylvania automobile code. Here the limitation is in respect of minor offenses, the other end of the scale from the fourth offender and life imprisonment. Evidently fearing that Pennsylvania squires and judges would make the punishment fit the criminal and desiring to have it fit the crime, contrary to the tendency in more serious cases, the lawmaker limited the discretion of the court. The codifiers were not as autocratic as in the case of fourth offenders; they left to the judge the alternative of a fine or a prison term, or both, but the fine can only be a specified sum and the malefactor can only be held in jail for a specified number of days, and there is no question of a maximum or minimum. The laws codified generally provided for a maximum and minimum fine and for a wide choice for the judicial arm in determining how long the offender should stay in prison. It is noticeable that these fixed sentences are less than the maximum and usually more than the minimum of the old law. The tendency to lighten punishment appears in the sections relating to felonies, but here the legislature gives wider latitude to the court to fix small fines and short terms by establishing a maximum only. There is one striking exception: selling or offering for sale a motor vehicle of which the maker's number has been defaced is punishable by a maximum fine of $5,000 or a maximum term of ten years or both, instead of being a misdemeanor of slight importance. This is interesting in connection with the use of makers' numbers as evidence in certificates of ownership of a car and to identify cars used in committing crimes.

There is no clear tendency either to greater severity or greater leniency in punishment. California, by chapter 889, reduces the minimum for murder in the second degree to five years from ten; Indiana, chapter 203, cuts down the punishment for petty larceny from one to eight years in state prison or a year in jail, to a maximum of one year in jail or the reformatory. Perhaps to make conviction easier, a former clause making a second offense punishable as for grand larceny is omitted. Grand larceny, too, is less serious, since the penalty is from one to ten years instead of one to fourteen. Again, for asault, the term is cut down from a minimum of two and a maximum of fourteen years to a minimum of one and a maximum of ten. The old clause favoring the well-to-do malefactor by allowing an alternative of a fine is out, so that everyone is equal before the criminal court when convicted of this crime. Rather strong in its testimony of the social result of very harsh penalties is Indiana, chapter 201, which reduces the minimum for automobile banditry from ten to five years, leaving the maximum at twenty-five.

On the other hand, several states have increased the penalty for specified crimes. Wisconsin believes that leniency serves no purpose with criminals who hold minors for a criminal purpose and stiffens the former punishment of from one year in jail to three in the penitentiary, with a five thousand dollar fine, by making the maximum term the minimum, so that hereafter such persons will get from three years to life in the penitentiary, but without a fine, under chapter 277. Nebraska, chapter 71, raises the maximum for robbery from fifteen years to fifty, leaving the minimum the same. Thus the legislature extends the discretion of the judge.

Penalties for arson are generally reduced, especially the maxima. Nevada, for example, by chapter 206, retains the minimum of two years for arson of a dwelling house, but changes the maximum from life to twenty years, and in other cases the ten year maximum is cut to three, except where the burning is to defraud an insurer, when five years is the maximum. Indiana, chapter 44, divides arson into first and second degrees; first, dwelling houses or appurtenant buildings; second, other buildings, with arson of personal property separately provided for. The old law lumped them together and set a penalty of from two to twenty years; the new law cuts the maximum for first degree to fourteen, for second degree to ten, and for personalty from one to three years. Thus the new law gives greater standardization of penalty to fit the degree of offense, but also diminishes the court's discretion to mete out a severe punishment to a particular offender where the crime may not be so serious in degree but the circumstances or character of the accused militate against him. Rhode Island, chapter 1043, raises the minimum to two years, from one, but lowers the maximum from life to twenty years in case of buildings. In case of personalty the maximum is raised from two to three years and a minimum of one year inserted, while where the burning was to defraud an insurer, the prison term is cut to from one to five years, against two and ten as formerly. Washington, chapter 265, raises the grade of burning to defraud an

insurer to a felony from a gross misdemeanor. This great difference of treatment of the same crime is striking evidence of the lack of a settled opinion of the value of greater or less punishment.[2]

A reform much followed in Europe is consecrated in the Michigan Code. In case of a sentence conditioned in payment of a fine, the judge may provide for payment in installments. The decrease in the value of money makes logical the change in the amount which makes theft grand larceny, from over $25 to over $100 in Indiana, chapter 203. New York, chapter 679, also raises to $100 from $50 the value which property must have to make its theft second degree larceny.

2. Report to the National Crime Commission on European Methods and Ideas of Penal Treatment, by Dr. Louis N. Robinson.

REPORT OF MASSACHUSETTS JUDICIAL COUNCIL

Recommends That Amount of Minimum Fines Be Increased to Conform to Decreased Value of Dollar—Urges That One Cause of Delay in Sacco-Vanzetti Case Be Eliminated—Material Increase in Entry Fees Proposed to Discourage Speculative Litigation—Would Extend Scope of Appeal to Supreme Court in Capital Cases—Judges Should Be Permitted to Express Opinion on Facts to Jury—Other Recommendations

THE third annual report of the Judicial Council of Massachusetts has been filed with the governor. It is numbered, "Public Document 144," and copies may be obtained at the Public Document Room at the State House.

The council consists of: Hon. William Caleb Loring, Honorary Chairman, Addison L. Green, Chairman of Holyoke, Hon. Franklin G. Fessenden of Greenfield, formerly Judge of the Superior Court, Hon. Joseph J. Corbett of the Land Court, Hon. William M. Prest of the Suffolk County Probate Court, Hon. Frank A. Milliken of the District Court at New Bedford, and Messrs. Robert G. Dodge of Boston, Frederick W. Mansfield of Boston and Frank W. Grinnell, Secretary.

The council was created by statute of 1924 "for the continuous study of the judicial system."

The report opens with a quotation from Mr. Justice Riddell of the Supreme Court of Ontario in which he said:

> "We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. . . . We can not afford to waste either time or money."

Then comes a summary of all cases entered in all the courts of the Commonwealth during the last statistical year and an analysis of the cost to the Commonwealth of the administration of justice followed by a brief study of the business of the various courts.

The net annual cost of all the courts and the Industrial Accident Department is somewhat over $6,282,000, and the net annual cost of the entire administration of justice including the expense of jails, prisons, etc., is approximately $10,500,000. In view of this cost, the council says:

> "It is possible to abuse the word 'business' in connection with our courts, but an instrument of government that involves an annual outgo as large as does our legal system has unquestionably its business side, which also demands that the money be used wisely and economically, and that the system function harmoniously and without undue delay."

The council points out that practically all fees, fines and penalties were established in pre-war times when the dollar was about twice its present value and that while wages, living and business costs including taxes, have greatly increased since then, the cost to the criminal of violating the law alone has remained constant. The council recommends a general increase in the amount of minimum fines.

The subject of delay in civil cases is then discussed at length and various recommendations are taken up from a business point of view.

The present statutes provide for sittings of the full bench in Bristol, Worcester, and the western counties once a year in September and in Boston for the other counties in October, November, January and March with a short special sitting for criminal appeals in May or June. The result of this arrangement is that unless cases are submitted on briefs without oral argument, cases from outlying counties often have to wait for a year or more before they can be heard and decided. Cases in Suffolk and the neighboring counties, if tried in January, February or later, can not ordinarily be heard in the appellate court until the following October or November. The council recommends that the full bench should sit in Boston for the hearing of cases from all counties, that special days be assigned for cases from the more distant counties in order that lawyers coming from a distance may not be kept waiting in Boston, and suggests that it would be advantageous if the court could sit for the first two weeks more or less of each month in the year except in summer, if the work of the court could be so arranged, in order that cases from any part of the Commonwealth might be argued as soon as their records are ready.

The council also renews its recommendation of last year that the requirement for reducing the record of the trial to narrative form, which delayed the Sacco-Vanzetti case for two or three years,

be abolished and that the practice be substituted of using copies of the stenographic record of the trial except such portions as both parties agree may be omitted.

A material increase in the entry fees in the Superior Court is again recommended as an effective method of discouraging speculative litigation for insufficient cause. To further reduce congestion in the Superior Court and undue expense to the public, it is recommended that an action at law for any amount may be brought in the district courts with a right in the defendant to remove the case to the Superior Court if it involves an amount above the present limits, for trial either with or without jury. A strong reason for this recommendation appears in the estimate of the relative operating cost per entry in the Superior Court of $66.45 as against $4.35 in the Boston Municipal Court and a cost per trial of $415.44 in the Superior Court as against $45 per trial in the Boston Municipal Court. These figures speak for themselves and the council believes that if parties are satisfied to try a case of any amount in the court which is less expensive for the public they should be allowed to do so and that, as to those cases which constitute the great bulk of the entries in all trial courts, which are never tried and involve mainly clerical work, the public has a right to expect that such cases shall be disposed of in the court in which the clerical machinery is less expensive to the taxpayer.

The present congested condition of the Suffolk County Court House is referred to as "the worst in the Commonwealth and an obstacle to the administration of justice." The larger part of all litigation in the Commonwealth takes place there. Legislative action for increased accommodations is urged and in the meantime it is suggested that rooms for the more pressing needs requiring little or no making over be leased by the county in office buildings as near the court house as practicable for temporary quarters.

The legislature requested reports upon three special subjects:

First, on the suggestion that in criminal cases, "except those growing out of the killings of human beings," a verdict by eleven jurymen should be sufficient. The council refers to the extended debate in the constitutional convention of 1917 upon the subject of majority verdicts and, after further discussion, state their opinion that, "The interest of justice will be better served and the confidence of the public better assured in the long run if the principle of unanimity is adhered to;"

Second, on the suggestion of Governor Fuller that the courts should be given authority to stay execution of the death sentence while judicial questions are still pending, instead of the present law which requires the governor to act in the matter. The council recommends that this authority be conferred upon the Supreme Judicial Court and states its opinion that no constitutional amendment is needed for this purpose because the power of the governor would not be restricted in any way by a statute authorizing such action by the court pending the decision of judicial questions;

Third, as to the suggestion that the words "willfully or negligently" should be added to the statute which makes it a crime to "operate a motor vehicle so that the lives or safety of the public might be endangered," after discussion of the effect of the present law, the council recommends that the word "negligently" should be inserted in the statute.

An important section of the report deals with the subject of delays in capital cases. It is pointed out that much of the delay in the Sacco-Venzetti case was due to the requirement of the narrative bill of exceptions and that, although it is not generally understood by the public the legislature removed that cause of delay in capital cases by a statute of 1925.

Another cause of delay is referred to as the act extending the time for motions for new trial which was passed in 1922. The council recommends that the limit of one year, which existed before 1922, be restored.

The question whether the earlier practice of requiring two judges of the Superior Court to sit in murder cases should be restored and other suggestions are discussed. The plan is favored of continuing the practice of trial before one judge but extending the scope of the appeal to the Supreme Judicial Court in capital cases so that court shall have the same powers as are provided by the statutes of New York of reviewing fully every judicial act of a trial judge including acts of discretion, such as the decisions on motions for a new trial on the ground that the verdict was against the weight of the evidence or decisions on the sufficiency of alleged newly discovered evidence to warrant a new trial. It is also stated that, "There should be one appeal as of right in a capital case, but there need be no more." In view of the interest in this subject, the draft of the statute to carry out these recommendations is as follows:

DRAFT ACT IN REGARD TO APPEALS IN CAPITAL CASES RECOMMENDED BY THE JUDICIAL COUNSEL

In a capital case the entry in the Supreme Judicial Court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require. After the entry of the appeal in a capital case and until the filing of the rescript by the Supreme Judicial Court motions for a new trial shall be presented to that court and shall be dealt with by the full court which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted or if any motion is filed in the Superior Court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the Supreme Judicial Court on the ground that it presents a new and substantial question which ought to be determined by the full court.

The report contains an extended discussion of the problems of the Supreme Judicial Court and sixteen different plans which were suggested to the council are stated. They are then taken up and discussed separately with an expression of opinion in regard to each of them.

The council advises against an intermediate appellate court or an appellate division of the Superior Court. It advises against an increase in the numbers of the Supreme Judicial Court on the ground that:

"The court has stood as a small court for over one hundred and forty years, and as such, with the longest continuous existence of any court in the country, it has acquired a deep-seated respect and prestige in the minds of the people of Massachusetts, which we believe to be one of the greatest elements of strength and value in the

government of the Commonwealth in the interests of all the people. We believe it would be a serious mistake to enlarge the number of this court."

It is also pointed out that an increase in the numbers of that court by even one judge would at once increase the majority needed for the decision of cases under the traditional practice from four to five. The present number of the court is seven.

A majority of the council recommends "after much consideration and discussion" legislation relieving the Supreme Judicial Court of all its nisi prius jurisdiction except admission to the bar and disbarment or other discipline of attorneys. Mr. Frederick W. Mansfield dissents from this recommendation for reasons stated and Judge Corbett reserves his right to dissent. This is a subject which has been a matter of discussion for many years and upon which there has been much disagreement among members of the bar. The reasons for and against the plan are clearly stated in the report for public consideration. All agree that the justices of the Supreme Judicial Court are at present overburdened with the pressure of work. The practical question is what is the best method of relieving them of some of the pressure so that the court may function better as a court of last resort. Under the plan recommended by the majority of the council, single justice sessions of the court would be discontinued, all equity cases would be brought in the Supreme Court, and all prerogative writs not in the nature of, or incidental to, appeals, would also be heard in the Superior Court. Writs of mandamus, prohibition and certiorari directed to a lower court and falling within the original supervisory jurisdiction of a court of last resort would be dealt with by the full bench of the Supreme Judicial Court, instead of in a single justice session. It is stated that all the justices of the Supreme Judicial Court believe that the single justice sessions should be abolished. The more detailed discussion of the reasons of the majority and of Mr. Mansfield's dissent are too long to quote, but deserve careful consideration.

One other subject upon which the council is not unanimous is the proposal to repeal the statute which prevents a trial judge from expressing to a jury any opinion on the facts of a case even though he makes it clear to the jury that they are not in any way bound to follow his opinion, but are to make up their own minds and to consider any view which he may express merely for what it is worth. This was the practice in Massachusetts before 1860 and is today the practice in the Federal courts. The majority of the council, for reasons which are stated at length, recommend the repeal of the statute so that the practice in the state courts shall be restored to what it was before 1860 and what it is today in the Federal Courts. Mr. Frederick W. Mansfield also dissents on this recommendation and Judge Prest reserves his right to dissent. Mr. Mansfield's reasons are expressed at length in the report. This question, like the question of abolishing equity sessions of the Supreme Judicial Court, is one which has been much discussed and upon which judges and lawyers have disagreed. The reasons for and against the plan are stated clearly for public consideration.

The following quotation indicates briefly the reasons for the recommendation of the majority:

"A majority of the council believes that as time goes on it is more and more important to honest, poor litigants who can not, or do not, have as shrewd, able and skillful lawyers as their opponents, that there should be a competent unmuzzled judge on the bench whose sole duty is to do his best to see that justice is done impartially. This is our understanding of the common law function of a judge in accordance with the best traditions of the profession and of the public service. . . .

"Jurymen are drafted from their private affairs, often at serious loss to themselves. If called upon to decide any important and difficult question outside of a court room, we believe that practical men would expect to hear what a trained man, specially employed to sit with them and listen to a case fairly, thought about it in order that they might consider his views before making up their own minds. We do not see why men should not have the same assistance inside of a court room. The question seems to us one upon which the judgment of the laymen of the community, who serve on juries, is likely to be as good, if not better, than that of lawyers. . . .

"The right to jury trial, guaranteed by our constitution, contemplates a trial before citizens of the same vigorous intelligence as of old, who can be trusted to listen to the judge's view if he feels that the case calls for a statement of them, and at the same time to follow his direction that they must make up their own minds and that it is their own judgment which is to govern. . . . We believe that the statute of 1860 is a reflection upon the brains, courage and good sense of those of our people who are subject to jury duty, and that it should be repealed. It should not be left to partisan lawyers alone to deal with the facts, especially as the skill of one may greatly outweigh that of his opponent. The jury should have *all* the assistance in arriving at a just verdict which may be given them by the only trained and impartial mind participating in the trial."

Mr. Mansfield, in his dissent, believes that the change is unnecessary and inadvisable. He says:

"I am not impressed by the argument that under our present law the judge is 'muzzled.' He has a right to comment on the testimony even now and as a practical matter it is usually a very dull judge who can not, and does not, intimate to the jury what his opinion is of the evidence. But whether the judge is muzzled or not under the present law I very much fear if it is changed that the result will be to take the muzzle off the judge and put it on the jury."

Another matter which has been much discussed in recent years is whether special justices of the district courts should be allowed to continue to practice before other judges in the same court in which they are special justices. The council states that they consider the present practice allowing it a serious blemish in our judicial system which breeds distrust of the courts. They express the opinion that the whole practice should be stopped. The difficulty with stopping it absolutely at the present time is that in some of the smaller judicial districts in the state the compensation provided for a special justice who only sits when the regular justice calls him in is such that it is supposed to be impracticable to secure competent special justices unless they are allowed to practice in the court in their own district. While recognizing this practical difficulty in small districts, the council expresses the opinion that there is no such difficulty in large districts and that a start should be made by legislation stopping the practice in all districts except those smaller ones where it is clear at present that such legislation would prevent the community from having proper judicial service.

The Council also recommends an act to extend the rule-making power so that the Courts may provide for declaratory judgments. Various other subjects are dealt with including a renewed recommendation to allow waiver of jury trial in criminal cases other than capital cases.

FRANK W. GRINNELL,
Secretary.

December 7, 1927.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

STATES' Rights and National Prohibition. By Archibald E. Stevenson. New York and Philadelphia: Clark Boardman Company. Pp. 157, $2.50. There is no great contention today over the theoretical question of the rights of the separate States or their duty to exercise these rights. Mr. Stevenson can quote both Republican and Democratic authorities in behalf of a fuller exercise by the States of functions of government which many tendencies threaten to devolve or have already devolved on the national government. The real problem here is not one of political theory. It is the practical question of getting the States to do efficiently the things which, because of their inefficiency or neglect and the greater resources, momentum and organization of the National Government, are easily taken over by the latter. Also the national consciousness has become more real and dynamic than the State consciousness, at least in many of the States, and interests are felt to be national and in need of national care that once were local. The loss and evil of excessive substitution of national for local action is recognized, but the remedy has not been found, nor does Mr. Stevenson suggest what it might be.

His concern is to deny the wisdom and the right of national action in the matter of prohibition. Such legislation, he holds, is inadvisable from the point of view of expediency, and fundamentally wrong in political principle. As to the unwisdom of prohibition, his argument is quite as valid against State prohibition as against National, although he later argues against National prohibition on the ground that the large majority of the States had already adopted it and that destruction or control of the liquor traffic might safely be left to the States.

The main contention of the book, however, is the claim that by the Tenth Amendment the States limited their own power and the power of Congress to amend the Constitution, by forbidding forever any delegation to or exercise by Congress of the reserved rights of the States to control for themselves all matters not expressly delegated to the National Government, and that the control of the manufacture, sale and use of liquor and the determination of sources of taxation belong to the States alone. Against Mr. Stevenson's view the layman who agrees with him as to the desirability of the largest possible measure of local self government and the smallest possible measure of legislation of any kind may hold—

1. That prohibition was not imposed upon the States by the National Government or by a decision of the Supreme Court. It was self imposed by the States themselves, whose representatives in Congress submitted to them at the demand of their own constituencies the Amendment which of their own accord the States proceeded to ratify. If States' rights were abridged, the States themselves abridged them. Mr. Stevenson's real quarrel must be with them.

2. That only 13 of the 48 States were in existence when the Tenth Amendment was adopted and that these 13 set up what Mr. Stevenson regards as the irrevocable and indissoluble Trust of a National Government to which no new powers abridging the reserved powers of the States might ever be delegated, and that of these thirteen, eleven, all but Rhode Island and Connecticut, ratified the Eighteenth Amendment. The Nation did not coerce them. They charged the Nation with the responsibilities involved in the Amendment.

3. That Mr. Stevenson's proposal to clear the constitutional situation by submitting a new amendment providing that the Tenth Amendment shall not be understood as prohibiting any transfer to the National Government of the powers reserved to the States when the States desire to make such transfer by constitutional amendment, would seem to surrender the whole contention of his book. If the Tenth Amendment absolutely and irrevocably forbade for all time any such transfer, then no new amendment such as he proposes would be possible. If it did not, then the Eighteenth Amendment which the States adopted as convincingly and overwhelmingly as they could adopt his proposed amendment, was valid. And the Supreme Court, as he recognizes, though he thinks wrongly, has so held.

4. That it is a great mistake to think that the American people, or the people of the several States, thought or think now of prohibition as an abridgement of their rights. There are, of course, people who so think, just as they resent game laws or traffic laws in the States, or federal laws with regard to tariff duties, or radio control, or immigration. But the real momentum behind the prohibition movement comes from the feeling of the people that the liquor traffic and what it involved was an economic evil and was also undermining and destroying their rights. Here was a business which would not obey the law, no matter how the law was framed, even at its own demand. It fostered corruption and crime. The talk about the dreadful effects of prohibition in weakening respect for law and in promoting crime is both tragic and amusing to those who know what the saloon and the liquor traffic did in the years before prohibition came. The Nation through the States, both as the people of the States and as the people of the Nation, came to prohibition because they were driven to realize at last that this was one business which could never be controlled except by extinction. It has not been extinguished, but it is more surely on the way to extinction

than vice or theft. On economic, social and moral grounds the nation came at last and slowly to prohibition, and Mr. Stevenson's book does not shake the legal and constitutional grounds on which it rests.

Prohibition of the liquor traffic has been demanded or accepted by the American people, whether conceived as a national body or imaged as a federation of State groups, in the interest of the largest social liberty. Mr. Stevenson quotes on his title page Burke's words, "The people never give up their liberties but under some delusion." But his discussion recognizes the fallacy of this view. All people, in order to be a people and also in order to assure the largest measure of liberty, give up liberty. "In forming the state for his own benefit," he says, "he [the citizen] delegated a portion of this [his] sovereignty to it, in order that he might find protection for those powers he reserved to himself." This is not historically or theoretically tenable, but a true principle is involved. "Every human being," the author proceeds, "has needs and desires which he seeks to satisfy. All those which can be fulfilled without injury to his fellows in a given state of society are rights which the State should recognize and which it is engaged to defend." Just so, and those which cannot be fulfilled without injury to his fellows are not rights which the State is bound to recognize and defend. In the adoption of the prohibition amendment the State, whether conceived nationally or federally, expressed its judgment, reached only after years of patient endurance, that the manufacture and sale of liquor and the maintenance of saloons were socially and economically injurious, that the rights of such traffic were inferior to other rights, and that its prohibition was in the interest of the larger liberty of the whole people.

New York City. ROBERT E. SPEER.

Cases on Partnership. By Scott Rowley. New York: Prentice Hall, Inc. 1927. Pp. xv, 784. $5.00. There are two respects in which Professor Rowley's case book differs from its predecessors in the same field. First, the editor has omitted citation of cases and has preferred instead abundant references to articles in the legal periodicals. Second, he has reduced materially the amount taken from each case by reducing the statement of facts to the lowest possible terms and citing only the most important parts of the opinions. In this way the size of the book has been reduced to about two-thirds the size of most of the preceding case books in the same subject. The first feature will probably commend itself to most teachers of law, while the second will appeal to the practitioner who uses a case book, if at all, as a convenient collection of syllabi of cases which emphasizes, in its table of contents, the most important principles of the subject. The considerable number of recent cases will add to the usefulness of the book in this field.

JOSEPH H. DRAKE.

National Prohibition: The Volstead Act Annotated and Digest of National and State Prohibition Decisions, Including Search and Seizure. With Forms. Third Edition. By Arthur W. Blakemore. Albany, N. Y.: Matthew Bender & Co., Inc. 1927. Pp. clii, 1047. $12.00. For the past five years, in my work as Assistant United States District Attorney, I have found this book to be an excellent work, its index full and complete, and its text well arranged and not merely a compilation of decisions. Particularly useful and illuminating are the quotations from the proceedings of the Congress which passed the National Prohibition Act. It gives a good start, not only as to authorities, but as to the probable intent of the particular provision under consideration.

I have found the book of great value in a number of cases involving the constitutionality of the injunction and abatement sections, the scope of prohibition, the powers of the Department, and searches and seizures.

Chicago. JACOB I. GROSSMAN.

Rome, the Law-Giver, by J. Declareuil, translated by E. A. Parker. New York: Alfred A. Knopf. 1926. Pp. xvi, 400.

To appraise this book properly it is first necessary to realize what it is. It is not a Textbook of Roman Law. It is not an isolated work. It is a volume, forming part of a series, indeed of two series, for, in its English dress, it is one of the series, "The History of Civilization," and in its French original it is part of a series, "L'Evolution de l'Humanité," and each series contains some of the volumes of the other, but not all. It is a section in a vast Universal History. It is addressed not to the specialist in Roman law or to his disciples, but to the instructed "general reader." This fact may excuse a certain looseness and over generality or even occasional error in the statement of the legal rule, which however rarely if ever falsifies the general historical picture which the author draws, and will no doubt disappear in a second edition.

His aim is to set out the factors in the evolution of the Roman law which are also factors in its world significance, what, in main outline, the law was which Justinian handed down to the Middle Age and how it came to be what it was. It is an unfortunate characteristic of such a book that however well it is done it will not be entirely satisfactory to anybody. Every reader acquainted with the matter will find that points are omitted or slurred to which he himself would have given prominence and what the reviewer has to say must be discounted on that score.

The synopsis of Roman law which the book contains is not the whole book, and it is not, though it occupies most of the space, the most important part of the book. Necessary it is, for without it the reader would be left without the evidence to support what is the real theme, the evolution of the legal system, the tendencies which informed that evolution and the historical causes of those tendencies. The somewhat scanty account of the "Sources" of Law which constitutes Chapter II of the Prolegomena forms a background which must be kept in mind by the reader. Its brevity renders it impossible to the author to emphasize what is clearly in his mind: the extraordinarily small part which legislation, in the form in which we know it, played in the development of the law. The section in the Prolegomena on the indebtedness of Roman law to foreign legislations is judicious and suggests more than it says. The author evidently does not accept the thesis that the jurists were saturated with Greek philosophy, and he is probably right. They were acquainted with the elements of that philosophy—of course they were: it was a main part of a gentleman's education in Rome. Many of the illustrations he gives of foreign influence are adoptions from provincial practice, some of them no doubt expressing the Greek philosophical standpoint, but not showing direct philosophical inspiration. In fact, as he says, even the orientals among the lawyers, and they were many, are intensely Roman in their law. It seems to be true (the author does not mention the point) that so far as direct influence of the philosophers can be traced, that of

their physical conceptions is far more evident than that of their ethical speculations. Much has been made of the *ius naturale,* but it is becoming clear that in the great age it was little more than a rhetorical ornament. Was this because the physical notions were easier to grasp?

The author emphasizes the independence of the *gentes* in early law, and the fact that the State, if it can be so called, had no concern with affairs within the *gens.* He tells us how the *gens* dwindled and the State grew in importance, not so much from aggression on its part as from recognition by the *gentiles* that "the State offered similar advantages on a much wider plane of evolution." (p. 46.) He speaks of the harmonizing and levelling effect of the XII Tables, on the date of which he accepts the orthodox traditional view. He sketches the evolution of the judicial process from the *legis actio,* through the *formula* to the *cognitio extraordinaria* and draws attention to the element of consent in litigation under the *formula.* He does not, however, emphasize its disappearance under the administrative methods of the *cognitio* system. He points out how appeal comes in when the judge has become an official, a member of a hierarchy, though it was impossible so long as the iudex, as in the formulary system, was a private person, a chosen arbitrator. He should have mentioned, as one of the most vivid illustrations of the disappearance of the element of consent, the procedure *in contumaciam* against an absent defendant. But in all this section the contrast between the feeble State of the early city and the all-embracing State of the late Empire is very well set forth.

The change from early conditions in the family when the *paterfamilias* formed his family, and controlled it, as he chose, and may be said to have subsumed the personalities of its members in his own, to that of later law in which the State determines the constitution of the family, and gravely limits the powers of its head, while the *filius* has acquired something like economic independence, is well told. The law of corporations and its history is stated as well as is possible in the space allotted to it, but there are thorny questions, e. g., how far the classics understood corporate rights, on which we should like to have the author's view.

The discussion of "real rights" is on orthodox lines, though the edict is credited with some things which seem to be due to other agencies. The degradation of mancipation from a solemn ritual to a mere document is briefly described, and the counter change of *traditio* from a transfer of control to a symbolic act is stated and perhaps overstated. For it does not seem to be proved that delivery of evidences of title was a good *traditio* of property even under Justinian, except in *donatio.*

Of obligations, the early history, or rather current opinion on it, is briefly and clearly set out. We are told of the distinction between *debitum* and *obligatio* and of the possible genesis of *obligatio* in hostage and pledge. But it is told too briefly and a good deal of detail in the settled law of contract might well have been sacrificed in favor of a fuller treatment of one of the most interesting chapters in legal history, the steps by which men attained the possibility of creating by their act a binding undertaking and nothing more. It is true that the story can be told and doubtless will be told in connection with other legislations where the evidence is clearer. The later history of contract receives rather scanty treatment. What was the effect of the practice of reducing all agreements to writing, of adding as common form a stipulatory clause? What was the real effect of Leo's enactment (C. 8.37.10) on the form of stipulation? These matters have been considered in a manner which compels attention by Professor Riccobono (Zeitschr. d. Savigny Stift, 43. pp. 363 sqq.; Bull. del Ist. di D. Romano, 31, pp. 30 sqq.). The author may dissent from some of his conclusions: we should have been grateful if he had perpended them and given his opinion. There is a succinct account of the organization of credit in which its elementary character as judged by modern standards is brought out.

The account of succession on death and the associated notions is disappointing. There is a statement of the law both early and late but nothing about the questions which have been so much discussed of recent years, the primary function of the primitive will (the author is satisfied that it was only to provide for lack of children to succeed) or the question of the genesis of the idea of universal succession, the first appearance of the notion that *"hereditas nihil aliud est quam successio in universum ius quod defunctus habuit,"* the source of the quasi-personification of the *hereditas iacens* and so forth. Room should have been found for this.

A very interesting part of the book is the short but lucid account of that amazing system of State Socialism and hereditary trade caste which characterized the fourth and fifth centuries. "In the fourth century," says M. Declareuil (p. 316), "the population of almost every town, with the exception of the *ima plebs,* was divided into various *collegia,* each devoted to a special duty, either administrative or economic. These administrative or economic guilds . . . became the slaves of the State, working henceforward under its control and generally for its immediate advantage." The *Codex Theodosianus* (especially Books 14 and 15) is full of legislation of this type. The guild member could not alienate his property and the position was heritable. Prices were fixed. It was not a democracy which established the most extreme example of State Socialism which the Western world has ever seen, but an autocracy.

We should have liked more discussion of the aims of Justinian, which remain somewhat enigmatic notwithstanding his monumental *Corpus Iuris* and the pronouncements which accompany it. In all branches of the law there may be found in the Digest and Code texts which express in clear terms rules of the classical law and others directly contradicting them and applying principles which are, or are supposed to be, quite alien to the classical law. Which of these is Justinian's law? What was really his aim? Was he trying, as he tells us he was, to get back to the classical texts, to restore so far as was possible the doctrine of the classical lawyers, or was this camouflage? Was he simply seeking to fortify modern doctrines by the authority of the classics? There does not seem to be sufficient reason to doubt that his pronouncements were in good faith, but in that milieu and with his agents it was an impossible task. The modern notions were bound to prevail, and the law transmitted to us through the school of Bologna, the set of conceptions which moulded the political thought of the Middle Age, was that of the later time. To the question what, where these conflicts exist, was the law of Justinian, it may be that there is no answer: it is "a regime in divenire" (Arangio

Ruiz, Istit. p. 79): a later generation had to make its choice and we know the choice it made. Probably in Justinian's own time the chance of getting the strict Roman rule applied by the courts varied inversely with the distance from the Imperial palace. But no less an authority than Professor Riccobono, of Palermo, holds that these classical propositions contradicted elsewhere are mere survivals, that the other rule is the law and that the best evidence of Justinian's law is the opinion of the Gloss. Is this the last word? It is an interesting question.

The translation is not very good. Mr. Parker uses, for the most part, a smooth-flowing English which rarely betrays the fact that it is a translation, and he has dealt skilfully with some difficult passages. But he is at times obscure and the obscurity seems to be due to lack of familiarity with the subject and especially with the French equivalents for technical terms of Roman law, an unfamiliarity which makes him sometimes reverse the meaning of his author. There are other mistranslations which seem to be the result of haste. It may be added that while it is permitted to an author who gives large numbers of references to make some errors therein, M. Declareuil rather abuses this right. Mr. Parker (apart from adding and omitting a few references, perhaps on his author's suggestion) has corrected some of these errors. Perhaps it was none of his business, but there are many more which a small amount of pains would have set right.

W. W. BUCKLAND.

Cambridge, England.
November 23, 1927.

Also received:

The Reference Shelf: Reprints of Selected Articles, Briefs, Bibliographies, Debates, Study Outlines of Timely Topics. Vol. 5, no. 1. *Prohibition.* By Lamar T. Beman, 1927. New York: The H. W. Wilson Co. Pp. 154. 90 cents.

Chicago. C. P. M.

Leading Articles in Current Law Reviews

Harvard Law Review, December (Cambridge, Mass.)—Mr. Justice Holmes and the Constitution, by Felix Frankfurter; The Progress of the Law—Analytical Jurisprudence, 1914-1927, by Roscoe Pound; The Silence of Congress, by Henry Wolf Bikle.

Yale Law Journal, December (New Haven, Conn.)—Legal and Economic Job Analysis, by John R. Commons and E. W. Morehouse; English Property Reform and its American Aspects, by Percy Bordwell; Powers in Trust and the Termination of Powers by the Donee, by Lewis M. Simes.

University of Pennsylvania Law Review, December (Philadelphia, Pa.)—Land Covenants in Pennsylvania, by Albert S. Bolles; International Treaties and the Clause "Rebus Sic Stantibus," by John P. Bullington; Keeping the Uniform State Laws Uniform, by William M. Hargest.

University of Pennsylvania Law Review, January (Philadelphia, Pa.)—Sir Thomas Erskine Holland, by W. S. Holdsworth; Validity of Contracts not to Compete, by Charles E. Carpenter; Limited Liability of Innkeepers Under Statutory Regulations, by Sylvan H. Hirsch; The Mexican Petroleum Company's Amparo Case, by Carlos Berguido, Jr.

Kentucky Law Journal, November (Lexington, Ky.)—Finders of Lost Property, by Roy Moreland; The Kentucky Law Reports and Reporters, by Richard Priest Dietzman; Resale Price Maintenance, by Cassius M. Clay; A Review of the Pardoning Power, by Harold W. Stoke.

Columbia Law Review, December (New York City)—Reorganization of Corporations: Certain Developments of the Last Decade: I, by Robert T. Swaine; Reorganization of Companies in Canada, by W. Kasper Fraser.

Columbia Law Review, January (New York City)—Corporate Criminal Liability: I, by Frederic P. Lee; Reorganization of Corporations: Certain Developments of the Last Decade: II, by Robert T. Swaine.

Indiana Law Journal, December (Indianapolis)—Law and Social Work, by Roscoe Pound; Rationale of Corporate and Non-Corporate Suretyship Decisions, II, by Walter E. Treanor.

Illinois Law Review, January (Chicago)—The Product of the Fifty-fifth General Assembly, by Ernst Freund; The Devolution of Title to Appointed Property, by Louis M. Simes; Criminal Procedure Seven Centuries Ago, by William Renwick Riddell.

Virginia Law Review, December (University, Va.)—Opinion Evidence of Medical Witnesses, by Henry W. Taft; An Establishment of Religion, by Blewett Lee.

Wisconsin Law Review, January (Madison, Wis.)—The Effect of Failure to Comply with the Wisconsin Statute of Frauds, by W. H. Page; Wisconsin Legislation of 1927, by John B. Sanborn.

Michigan Law Review, January (Ann Arbor)—Congress and the National Administration, by John A. Fairlie; Tort Liability of Landlord, Part I, by Raymond Harrison Harkrider; The Influence of Control in the Determination of Partnership Liability, by Scott Rowley.

Cornell Law Quarterly, December (Ithaca, N. Y.)—Edwin Hamlin Woodruff, an Appreciation, by Cuthbert W. Pound; Edwin H. Woodruff, Teacher, by William H. Farnham; Property and Sovereignty, by Morris R. Cohen; Suspension of the Power of Alienation in New York, by Horace E. Whiteside.

University of Cincinnati Law Review, January (Cincinnati)—Administrative Commissions and the Administration of Justice, by Howard L. Bevis; Escrows and Conditional Delivery of Deeds in Ohio, by Charles C. White; Substantive Law—Remedial Law—Law of Proof, by Otis H. Fisk.

American Law Review, November-December (St. Louis, Mo.)—Credit Bureau Functions of Trade Associations: The Legal Aspects, by David L. Podell and Benjamin S. Kirsh; Presumptions as to Foreign Laws, by Robert Von Moschzisker; Plain and Concise Language, by George Rossman; A Forgotten Chapter in the Early History of the Corporate Trust Deed, by James G. Smith.

Iowa Law Review, December (Iowa City, Ia.)—Continuous Code Revision in Iowa—The Code of 1927, by O. K. Patton; Recent Legislative Changes in Procedure, by Wayne G. Cook; The Case of Bardell v.

Pickwick as an Historical Document, by W. S. Holdsworth.

Texas Law Review, December (Austin, Texas)—The Concept of "Possession" in Constructive Adverse Possession in Texas, by Frank Bobbitt; The Rights of Riparian Owners at Common Law in Texas, by Ira P. Hildebrand; Part Performance as Validating Parol Contracts for the Sale of Lands, by Joyce Cox.

St. Louis Law Review, December (St. Louis)—Some Responsibilities of Legal Education, by William G. Hale: The Long and Short Haul Rule in Missouri, by Charles E. Cullen; Power of a Missouri Court to Instruct the Jury in a Criminal Case that it may Return a General Verdict of Guilty and Permit the Court to Fix the Punishment, by Arthur J. Freund; The Newer Social Scientists Look at Law, by Ralph F. Fuchs.

Law Notes, December (Northport, N. Y.)—Objections and Exceptions in Federal Courts, by W. A. Shumaker; Stop, Look and Listen, by Ralph Straub; Foreign Matrimonial Decrees.

West Virginia Law Quarterly and The Bar, December (Morgantown, W. Va.)—The Scope of the Constitutional Immunity against Searches and Seizures, by John E. F. Wood; Review of Observations Upon Civil Procedure in West Virginia, by Leo Carlin; Compensation to Landowners for Property Lying within Limits of Ancient Turnpikes upon Change in Travelled Way, by Robert T. Donley.

Philippine Law Journal, October (Manila)—Some of the Salient Features of the Correctional Code, by Emiliano M. Panis; A Critical Study of the Law on Percentage Tax on Merchant's Sales, (Continued) by Crispin Llamado.

Marquette Law Review, December (Milwaukee, Wis.)—Who owns the Bed of Lake Michigan? by Clifton Williams; Municipal Borrowing in Wisconsin by Charles B. Quarles; Proposed Anti-trust Law Changes—Competition on the Defensive, by Emerson P. Schmidt; Natural Rights as Secured by the Constitution, Part I, by Thomas P. Whalen; The Law of Title Insurance, by L. A. Pelkey.

The Lawyer and Banker, November-December (New Orleans, La.)—Rights of Religion and the Bible in Public and Private Schools, by Raymond M. Hudson; Eliminating the Waste in Land Transfers, by Wm. H. McNeal; Time for Appointment of Guardians Ad Litem, by F. C. Hackman.

Georgetown Law Journal, November (Washington, D. C.)—Fletcher vs. Peck, by Horace H. Hagan; "The Characteristic Bent of a Lawyer" in Jefferson, by William Jennings Price; Some Constitutional Aspects of Corporate Citizenship, by William Grafton Elliott, Jr.; A Sketch of the History of the High Court of Chancery from the Chancellorship of Wolsey to that of Lord Nottingham, by William Lindsay Carne.

AMERICAN LAW INSTITUTE COUNCIL MEETS

THERE was a large attendance of the members of the Council of the Institute at its recent meeting in New York, Dec. 14-17. The morning session of the first day was taken up with a discussion of the plans for work on the Restatement of the Law and the Code of Criminal Procedure submitted by the Executive Committee and Director. There are now seven groups working on different branches of the Restatement: Agency, Business Associations, Conflict of Laws, Contracts, Property, Torts and Trusts. Tentative drafts of different parts of all these subjects will be submitted to the Council by the respective groups during 1928. Arrangements were made to have the group working on Contracts, of which Mr. Samuel Williston is Reporter, submit a revised tentative draft of the first half of Contracts to the next meeting of the Council, to be held on February 29, March 1, 2, and 3, with a view to its final adoption by the Council and submission for similar action to the next Annual Meeting of the Institute, which will take place in Washington, D. C., on April 26, 27 and 28.

Having disposed of all executive business at its first session, the Council spent the rest of the time until its adjournment late on the fourth day of the meeting in a consideration of a draft of the chapter on Contracts and Wrongs, submitted by the group working on Conflict of Laws, the chapter on the Statute of Frauds submitted by the Contracts Group, and the chapters covering the first part of the Code of Criminal Procedure submitted by the group working on that subject. The chapters on Conflict of Laws and Contracts, after adoption of some amendments by the Council, were tentatively approved and they will be considered by the members of the Institute at the April Meeting. More than two days were devoted to a consideration of two of the three chapters of the Code of Criminal Procedure, the chapters on Arrest and Preliminary Hearing. The discussions on almost every section were long and animated, practically every member present taking part. It is expected that the next meeting of the Council will consider the chapters on Bail, Indictment, Methods of Prosecution and Grand Jury, the present desire of the Council being to present to the Annual Meeting all that portion of the Code which relates to matters preceding Trial or about one-half of the complete Code.

In addition to the above matters the Council will consider at its February-March meeting the parts of Agency and Business Associations (Corporations for Profit) which have been prepared by the respective groups working on those subjects.

Some idea of the great amount of work being done can be gathered from the statement that between May and December there were ten conferences, of four and five days each, of the groups working on the Restatement and two conferences on the work of the Code of Criminal Procedure, besides an extended conference of the Reporters on Terminology and a conference of State Bar Association Co-operating Committees lasting three days, in October in Chicago, attended by more than eighty persons as well as by the President and Director of the Institute and all the Reporters. The Budget for 1928 calls for an expenditure of $152,587.47.

AMERICAN BAR ASSOCIATION JOVRNAL

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REASONS FOR JOINING THE AMERICAN BAR ASSOCIATION

"Why should I join the American Bar Association?" is a question which will be asked frequently during the campaign to raise the membership of the organization to at least 35,000 by the Semi-centennial Celebration at the next annual meeting. It is a natural question. Here are some pertinent answers which members may find useful:

You should join it because the American Bar Association is doing more than any single agency today to cultivate a correct attitude in the public towards the profession —to show it what the profession as a whole really stands for. It is steadily meeting the traditional and easy criticism of the Bar, not by wasting any time in futile verbal answers to those criticisms, but by doing things that speak louder than words; by constructive programs that mean real advance and which the intelligent portion of the community can readily understand and appreciate. You, with every other respectable lawyer, are beneficiaries of these efforts, and self interest in the higher sense suggests that you help promote them.

You should join it because it is an eminently practical organization which proposes eminently practical ends. Interesting as its social features are at times, they are a mere incident. Look over the list of committees and see the subjects it is undertaking to deal with. Look over the sections and note the important fields to which these subordinate bodies are devoting themselves with greater and greater effectiveness. Look over the proposals which the Association as a whole is sponsoring before national and state legislatures and elsewhere. There is no mere theorizing there. These are things as real as the rocks.

You should join it because you owe it to yourself. It is a means of enlarging your professional self by enlarging your range of interests. It is a means of focusing your attention on special fields of law or special movements that are of interest to you and of securing the advantage of association with others who are interested in the same things. It is a means of making acquaintances all over the country which may be some time of great value. It enables you to keep in touch with the most important things that are being done in the field of your chosen profession. It furnishes the stimulus and inspiration of a broader view and thus helps to a better grasp of the immediate task at hand.

You should join it because you owe a duty to your profession higher than merely to get a living out of it. It is a profession with a great tradition of public service, and the American Bar Association peculiarly embodies this tradition in the national field. Its efforts are devoted to the improvement of the administration of justice, to promoting the science of jurisprudence, to simplification of law, to the maintenance of correct professional standards of Bench and Bar: all public objects of the first importance. No real lawyer should feel himself without obligation to do his share to maintain this great tradition of the profession.

You should join it because only through professional solidarity can these purposes be achieved; and professional solidarity in any real sense is an empty word today unless it manifests itself in effective organization. The individual lawyer, no matter how strong, is a voice crying in the wilderness as far as these larger movements are concerned. Holdsworth points out clearly how powerfully the common devotion of the Bar to the common law and the principles of liberty which it embodies, in a word, the close-knit cooperation of the lawyers, contributed to the ultimate triumph of those principles. If the solidarity of American lawyers cannot be counted on, then vital

movements to improve the administration of justice today are sure to fail.

You should join it because the Journal of the American Bar Association, the official organ, will bring to you every month, without additional cost, a series of interesting and worth-while articles by members of the profession who are on the legal firing line, as practitioners, judges, and teachers of the law. It will furnish you with material which, if properly preserved, will be useful on more than one occasion. If you are called on to make an address on some special subject, the chances are great that you will find in your files of the Journal material which is accurate and very much to the point. And the value of this material will be increased by the plan to issue, as one means of commemorating the Semi-centennial of the Association, a cumulative, topical index of all the volumes of the Journal since it was changed from a quarterly to a monthly publication.

You should join it because the annual meetings are becoming more and more interesting and significant for those who attend, and because those who do not attend are afforded a practical participation in its proceedings by an accurate report in the Journal and a subsequent more extensive publication of proceedings and papers in the Annual Report. These annual meetings are held in various sections of the country, thus affording particular conveniences for attending to members residing in those sections. These annual meetings always have social diversions which members and their ladies find most enjoyable.

You should join it because the Annual Report of the Association, furnished to members without additional cost, is a publication full of valuable material. All important papers read at annual meetings, all addresses, and much other matter are contained therein. There is an alphabetical index of members and there is an additional list of members by states and towns, which should often prove useful to lawyers desiring a correspondent in a strange and distant community.

You should join it because every lawyer in the country can readily afford to pay the nominal membership fee. Membership imposes not the slightest financial burden. The American Bar Association is not an organization for profit. Its officers receive no pay—except the compensation that comes from the sense of a duty well performed. It can therefore be conducted on an economical basis. The publications which the member receives without extra charge are alone worth the small membership fee required. From a bookkeeping standpoint the Association really costs you not a cent. From a proper professional standpoint it is worth a great deal.

THE AMERICAN LAW INSTITUTE AND THE BAR

The latest form of cooperation between the Bar and the American Law Institute is the annotation of certain of the Restatements with the decisions of State courts. This is being done under the auspices of the State Bar Associations. The plan was approved at a conference of cooperating committees of the Bar Associations and officers of the Institute held in Chicago last October.

Michigan has already annotated the Restatement on Conflict of Laws in this way. The work showed that the rules given in the text were in harmony with Michigan decisions to an extent almost surprising. In a few instances there was lack of complete accord and the variations are affording an interesting subject for local study and discussion. The fear that the Restatements would unsettle the law and invite conflict is proving to be without foundation.

The Illinois Bar Association is undertaking the same thing with the Restatement of Agency. The Deans of the three principal Illinois Law Schools—Northwestern, Chicago and Illinois—have promised full cooperation. At the last meeting of the Nebraska State Bar Association the suggestion was made that it would be well for that organization to annotate one of the Restatements. Other Associations are no doubt taking up the idea.

The plan has the advantage of relating the work of the Institute to the local interest of the Bar in various States. It uses the State decisions as a means of stimulating interest in the Restatements and the Restatements furnish a means of giving the members of the Bar what they naturally always desire—a better knowledge of the rules obtaining in their own State on the particular subject restated. The advantage is thus mutual and this probably accounts for the growing interest in this method of bringing the Restatements to the Bar.

REVIEW OF RECENT SUPREME COURT DECISIONS

Sufficiency of Tender in Light of Modern Business Practice—Reparation for Excessive and Discriminatory Freight Rates Between Points in United States and Foreign Country —Self-Serving Declarations—Documents May Be Legally Seized Under Warrant to Seize Paraphernalia Used in Maintaining Nuisance Violative of Prohibition Act—Counsel Fees in Foreclosure Suit on Public Bonds—U. S. Supreme Court Rules Regarding Costs Apply to States as Litigants—Income Under Indian Land Leases Held Subject to Federal Tax —Revenue Act of 1924 Invalid as to Gifts Prior to June 2, 1924—Deduction of Worthless Debts.

By Edgar Bronson Tolman

Contracts—Purchase Price—Sufficiency of Tender

In an action brought by the purchaser for breach of a contract for the sale of a business which acknowledges the receipt of a check in part payment of the purchase price, where the seller refused to accept the certificate of deposit of a solvent bank as additional payment of the price on the day fixed for performance and refused to allow time to the purchaser to procure cash, it is a question for the jury, whether, in view of modern business practice, this was a sufficient tender of the purchase price and whether the seller's refusal was final so as to relieve the purchaser from the necessity of doing anything further.

Simmons v. Swan, Adv. Op. 72; Sup. Ct. Rep. Vol. 48, p. 52.

The plaintiff sued the defendant for breach of a contract for the sale of a pickle factory, certain equipment, and the good-will of the business, all of which the defendant had agreed to sell to the plaintiff. By the terms of the agreement the plaintiff was to pay fifteen thousand dollars for these items, five hundred dollars at the signing of the agreement, "check for which is hereby acknowledged," twenty-five hundred on October 1, 1923, and the balance by note. The defendant was to convey all pickles in tanks on the premises for a stipulated price per thousand, and when the number was determined the purchaser was to give a note for them. Time was stipulated to be of the essence of the contract, and the day of performance October 1, 1923, at Greenfield, Massachusetts. Before this date the seller indicated by letter that he would take a check for pickles in the tanks.

At the trial a verdict was directed for the defendant and the Circuit Court of Appeals affirmed the judgment entered thereon. A writ of certiorari was granted to the Supreme Court of the United States. There the judgment was reversed, Mr. Justice Holmes delivering the opinion of the Court. The facts and the question involved are sufficiently explained in the following language of the opinion:

> A short statement of the dominant facts as they might have been found seems to us sufficient to show that the plaintiff had a right to go to the jury. The plaintiff and his party went to the appointed place on the appointed day, but the defendant was not there and his whereabouts were not to be ascertained, until about two o'clock when he telephoned that he was on his way to Greenfield and probably should be there by three. He arrived somewhere about five or later. After some discussions necessary to finish the business, at from six to seven the papers were signed and ready. The plaintiff then offered to the defendant for the twenty-five hundred dollars that he was to pay, a certificate of deposit from the Produce National Bank of South Deerfield—a bank near by and of unquestioned solvency. The defendant thereupon asked his lawyer if he had got to take it; the lawyer intimated that he was not bound to, and the defendant said, "Well, if I haven't got to take it I am not going to take it; and I will simply say good-night, gentlemen"; took his hat and coat and walked out. Of course at that hour the banks were closed and the plaintiff could not get legal tender before the next day. In consequence of a frost the price of pickles had risen greatly, and the judge at the trial said that it was perfectly obvious that the defendant was trying to get out from under his contract. It will be noted that the contract contemplated that the first payment should be by check, and on September 22 the defendant had sent to the plaintiff a letter addressed to the Silver Lane Pickle Company, assumed to be interested, asking for a "check in full for the pickle stock" for which by the agreement he was to receive a note; the amount as it turned out, being nearly fifteen thousand dollars. In such circumstances and in view of the way in which business is done at the present day, it might be found to have been natural and reasonable to suppose that a certificate of deposit from a well known solvent bank in the neighborhood would be enough. It seems likely that it would have been except for the defendant's desire to escape from his contract. If without previous notice he insisted upon currency that was strictly legal tender instead of what usually passes as money, we think that at least the paintiff was entitled to a reasonable opportunity to get legal tender notes, and as it was too late to get them that day might have tendered them on the next. But the jury might find also that the defendant's behavior signified a refusal to go farther with the matter and therefore that the plaintiff was not called upon to do anything more. If these were found to be facts, as they might be, the defendant broke his contract and the plaintiff has a right to recover. We have not mentioned some qualifying details insisted upon by the defendant because we have to consider only what the jury might find. The qualifications do not impress us, but there are some important contradictions. The defendant will have an opportunity to present them if the case is tried again.

The case was argued by Messrs. William J. Malone and Percy S. Bryant for petitioner and by Mr. Charles Fairhurst for respondent.

Interstate Commerce Commission—Rate Regulation

Reparation may be awarded for excessive and discriminatory rates between points in the United States and points in a foreign country.

News Syndicate Co. v. New York Central R. R. Co. et al., Adv. Op. 41; Sup. Ct. Rep., Vol. 48, p. 39.

The plaintiff brought this action to recover from the defendant railroad companies reparations

which had been awarded by the Interstate Commerce Commission. The plaintiff had shipped carloads of newsprint paper from Thorold, Ontario to New York City and was charged at the rate of 37 cents per hundredweight prior to July 1, 1922, and 33.5 cents thereafter. The Commission found that the rate effective from August 26, 1920, to July 1, 1922, was unreasonable so far as it exceeded 32 cents and that the rate applied after that date unreasonable in exceeding 29.5 cents. It found that the plaintiff was entitled to reparations from carriers "engaged in transportation of those shipments within the United States" to the extent that it was charged excessively, under the rates found to be unreasonable.

The reports of the Commission show that Thorold is 30 miles from Black Rock, New York, where railroads in the United States connect with the Canadian Railways, and 12 miles from another junction point. These junction points are 414 and 447 miles respectively from New York City, and the rates complained of applied over several railroads from these junctions. No rates were published covering transportation from New York City to the international boundary and no finding was made by the Commission as to what would be reasonable rates for such transportation.

In the trial court the defendants demurred on the ground that the Commission had no jurisdiction because the charges dealt solely with transportation from a point in Canada to a point in the United States. The demurrer was sustained by the court and the suit was dismissed. An appeal was taken to Circuit Court of Appeals. That court certified four questions to the Supreme Court of the United States to aid it in properly determining the cause.

The first question was in substance: Where a United States railroad and a Canadian railroad publish a joint through rate from a point in Canada to a point in the United States, the rate covering transportation in both countries, has the Interstate Commerce Commission jurisdiction, on complaint against the United States railroad alone, to determine the reasonableness of such joint through rate?

The Supreme Court in an opinion delivered by MR. JUSTICE BUTLER answered this question affirmatively and stated the following reasons therefor:

> As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. §1 (1) and (2). It was the duty of the defendants in error to establish just and reasonable rates for that service. §1 (5), §6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an "award of damages under the provisions of this Act for violation thereof." §16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

The second question was in substance whether the Commission had jurisdiction to award damages in the amount that the entire charges under the joint through rate exceeded the charges which would have been made under a reasonable joint through rate in the absence of a finding that the charges for the transportation in the United States were unreasonable, where the payment has been made to the United States carrier.

This question also was affirmatively answered and the following exposition given in the opinion:

> As to question 2.—The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, §13 (1), and had jurisdiction to make the order. § 16 (1). The question should be answered in the affirmative.

The third question was substantially, whether an action could be maintained against a United States carrier alone on a finding by the Commission against only the United States carrier. The learned Justice stated that the answers to the first two questions made it sufficiently clear that this also should be affirmatively anwered.

The Court declined to answer the last question whether the trial court erred in sustaining the demurrer. With reference to this the opinion contains the following statement:

> As to question 4.—Section 239 authorizes the Circuit Court of Appeals to certify to this court "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause." It is well-settled that this statute does not authorize the lower court to make, or require this court to accept, a transfer of the case. The inquiry calls for decision of the whole case. It is not specific or confined to any distinct question or proposition of law, and therefore need not be answered.

The case was argued by Mr. Luther M. Walter for the plaintiff in error and by Mr. Parker McCollester for the defendants in error.

Evidence—Self Serving Declarations

A statement in a letter sent by the plaintiff to the defendant asserting that the defendant's agent on behalf of the defendant made with the plaintiff the agreement sued upon, even though undenied by the defendant, is a self serving statement and in an action on such agreement the letter containing the statement is not admissible in evidence to prove it where there is undisputed testimony that the agreement was not authorized by the defendant and that the letter sent by the plaintiff was never received by the defendant.

A. B. Leach & Co. v. Pierson, Adv. Op. 75; Sup. Ct. Rep., Vol. 48, p. 57.

Pierson, the plaintiff, sued the defendant, a corporation, for breach of an alleged agreement whereby the defendant had agreed to repurchase, at a specified price, certain bonds which Pierson had bought from it. The only evidence of such an agreement was the plaintiff's testimony that Mather, a salesman, made the promise on behalf of the defendant. As proof that it was within the scope of Mather's authority to make such a promise on the defendant's behalf, the plaintiff offered in evidence a letter which he had written to the defendant, say-

ing: "It was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98. I have need of some money and will avail myself of this privilege. When shall I deliver them to you?" The admission of this in evidence was objected to by the defendant on the ground that it was a self serving document, but the court admitted it subject to exceptions The officers of the defendant company denied having ever received the letter and denied that Mather was authorized to make such an agreement on its behalf.

No other proof of Mather's authority was offered, but the court instructed the jury that if the defendant received the letter and failed to disaffirm the agreement referred to they would be justified in finding that the company acquiesced in the agreement and that Mather had such authority as he was asserted by Pierson to have had. The jury found a verdict for the plaintiff and the judgment entered thereon was affirmed by the Circuit Court of Appeals.

On a writ of certiorari the judgment was reversed by the Supreme Court of the United States in an opinion delivered by MR. JUSTICE HOLMES, who adopted the view that the letter was a self serving declaration and as such was not admissible in evidence under the circumstances.

> A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission.
>
> There were no circumstances in this case to take it out of the general rule. The letter might have been admissible as a demand if a binding contract had been proved, but until evidence of Mather's authority was given the demand was immaterial. It is true that two days after that on which the plaintiff says that he wrote the letter that we have quoted the petitioner lent to the plaintiff $15,000 on the security of the $20,000 bonds in question with the usual powers of sale and the plaintiff's note. It would be the merest speculation to regard the plaintiff's story as confirmed by this loan. It may as probably have been an independent transaction, and it might be argued at least as plausibly that the plaintiff's note and assent to the severe conditions of a pledge to brokers was inconsistent with the right that he now asserts. No evidence having been given of Mather's authority to make the contract in suit, the petitioner was entitled to a verdict. The request that one should be directed should have been granted. A new trial must be awarded.

The case was argued by Mr. Francis Rawle for the petitioner and by Mr. John Arthur Brown for the respondent.

Evidence—Illegal Search and Seizure

It is illegal for a federal officer to seize documents under a search warrant which describes only intoxicating liquor and articles for its manufacture, as the things to be seized, and such documents are not admissible in evidence against the person possessing them in a prosecution for violation of the National Prohibition Act. They may be seized legally, however, as part of the equipment used in maintaining a nuisance in violation of said Act, and in such cases are admissible in such prosecution.

Marron v. United States, Adv. Op. 45; Sup. Ct. Rep. Vol. 48, p. 74.

The defendant, Marron, was convicted on charges that he had conspired to violate the National Prohibition Act including the maintenance of a nuisance on premises in San Francisco. His conviction was affirmed by the Circuit Court of Appeals and the United States Supreme Court granted a writ of certiorari to determine whether certain evidence was properly admitted at the trial.

It appeared that the defendant was the lessee of part of 1249 Polk Street in San Francisco. On October 1, 1924, a warrant was issued for the search of the premises, particularly describing what was to be seized,—intoxicating liquors and articles for their manufacture. Acting under this warrant prohibition agents entered the building and found there slot machines, an ice box, chairs, tables, a cash register, and men and women some of whom were being furnished intoxicating liquors. The defendant, Marron, was not there, but one Birdsall was in charge, and was arrested. In a closet the agents found and seized quantities of liquor, a ledger, and some bills for gas, electricity, water, and telephone service. The return of the warrant showed a seizure of only the liquor. Before the trial the defendant applied to the court for the return of the ledger and bills and for suppression of them as evidence but the application was denied. When the trial took place it appeared that most of the entries in the ledger were made by the defendant and that he was connected with the business of selling liquor as a proprietor or a partner.

The present appeal was brought to test the admissibility in evidence of the ledger and bills seized by the government agents. The Supreme Court of the United States rendered a ruling on the two theories advanced in support of admissibility. MR. JUSTICE BUTLER, who delivered the opinion of the Court explained as follows, the reason for ruling on both theories:

> It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.
>
> The petitioner insists that because the ledger and bills were not described in the warrant and as he was not arrested with them on his person, their seizure violated the Fourth Amendment. The United States contends that the seizure may be justified either as an incident to the execution of the search warrant, or as an incident to the right of search arising from the arrest of Birdsall while in charge of the saloon. Both questions are presented. Lower courts have expressed divers views in respect of searches in similar cases. The brief for the Government states that the facts of this case present one of the most frequent causes of appeals in current cases. And for these reasons we deal with both contentions.

The learned Justice then discussed the considerations which controlled in the rejection of the theory that the papers introduced were covered by the search warrant saying:

> The Fourth Amendment declares that the right to be secure against unreasonable searches shall not be violated, and it further declares that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In Boyd v. United States, Mr. Justice Bradley, writing for the court, said: "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed

'the liberty of every man in the hands of every petty officer.'" And in Weeks v. United States, Mr. Justice Day, writing for the court, said: "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

It is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant.

But the second theory of admissibility that seizure of the ledger and papers was authorized by the warrant to seize paraphernalia used in maintaining the nuisance was regarded as sound.

When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance, the maintenance of which is punishable by fine, imprisonment or both. The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offence. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

The case was argued by Mr. Hugh L. Smith for the petitioner and by Assistant Attorney General Mabel Walker Willebrandt for the respondent.

Public Bonds—Counsel Fees in Foreclosure Suit

The services of a trustee and trustee's counsel are necessary incidents in the foreclosure of a mortgage given to secure bonds issued by a road district, and consequently it is proper for a federal court to allow reasonable sums to pay for such services in a foreclosure suit brought in such court and to charge the fund raised by assessments to pay for these services.

Mercantile Trust Co., of St. Louis, Mo., v. Wilmot Road District, Adv. Op. 74; Sup. Ct. Rep. Vol. 48, p. 61.

The District Court refused to allow to the Mercantile Trust Company any sum for its services as trustee or for counsel's fees in a mortgage foreclosure suit although it found $2,500 to be a reasonable sum for service as trustee and $7,500 as reasonable counsel fees. This view having been sustained by the Circuit Court of Appeals, a writ of certiorari was granted by the Supreme Court of the United States which reversed the decree in an opinion delivered by MR. JUSTICE HOLMES.

The reason given by the District Court for disallowing the charges was that they were not provided for in the statute creating the Wilmot Road District which made the mortgage. In rejecting this view the learned Justice said:

The petitioner's reasoning convinces us that the charges should be allowed as costs against the defendant. In the bonds secured the District expressly covenants that in case of default there shall be paid to the, trustee out of the proceeds of the assessments pledged, "and before the payment of the interest and principal of said bonds, a reasonable compensation to the Trustee and to such counsel as the Trustee may find it necessary to employ." This plainly means a payment out of the assessments over and above the payment to the bondholders, if the words are to receive a natural interpretation and are not required by the statute to be read in a different sense.

Provisions in the statute creating the District were next summarized and it was pointed out that the commissioners of the District were empowered "to make any such contracts in the prosecution of the work as may best subserve the public interest. to borrow money, issue negotiable bonds and to pledge and mortgage all assessments for the repayment thereof."

As said by the petitioner, a trustee obviously is necessary for a mortgage to secure bonds that are expected to go into many hands, and if a foreclosure is required a lawyer must be employed. The statute must be taken to contemplate and authorize these usual incidents of the mortgage that it invites. It cannot have expected the services to be gratuitous and there is no reason why the cost should not be borne by those who made them requisite. It is said that the assessment is a public fund not to be applied except as its creation provides. A pretty ignoble immunity has been secured at times on that argument, but it should not be allowed to work more injustice than is inevitable.

After suggesting the existence of doubt as to whether a State could prevent federal courts from imposing such costs and declaring that in any event the State Court here had not construed the statute as attempting to so prevent them, the learned Justice concluded his opinion as follows:

It is to be observed that the fund got by the assessment was not exhausted by the payment of the bonds, so that no question arises on that score. Nor does it seem to us that the District can get immunity from the words of § 20 forbidding the board to use any money arising from the sale of the bonds for any purpose other than therein specified and expressly directed. For without stopping to quibble over the fact that the money in question comes from the assessment rather than from the sale of the bonds except to note that the section has a different aim, it is enough that, if we are right, the proposed use of the money is expressly authorized, as a necessary incident of the mortgage provided for in § 13. In other places the statute contemplates payment for necessary services; we cannot believe that it does not contemplate a similar payment here.

The case was argued by Mr. George B. Rose for the petitioner and by Mr. Robert E. Wiley for respondent.

Practice on Appeal—Power of Court to Make Rules Regarding Costs—Costs Against States

Costs may be taxed against a state which is a litigant in the Supreme Court of the United States pursuant either to a statute or to a rule of court.

Fairmont Creamery Co. v. *Minnesota*, Adv. Op. 76; Sup. Ct. Rep., Vol. 48, p. 97.

The Fairmont Creamery Company had been

convicted on a charge of an offense under a Minnesota statute. The conviction was affirmed by the State Supreme Court, but was later reversed by the United States Supreme Court on the ground that the statute was unconstitutional, and the latter court adjudged costs against the State.

After the term had expired the State of Minnesota moved to retax the costs. The motion was denied in an opinion delivered by the CHIEF JUSTICE. He first pointed out that the court had no jurisdiction to grant the motion because the award of costs was part of the judgment and that after the term expired the court had no power to amend the judgment.

However, the Court was unwilling to rest its decision on this ground alone, and the opinion proceeded as follows:

> But we are not content to dispose of the motion on this ground alone, even though it be adequate, for the main question is one of much importance in the everyday practice before us and ought to be decided now. The argument for the state is that this is a criminal case; that costs in criminal proceedings are only a creature of statute, and that this court has no power to award them against a state unless legislation of the state has conferred it. This is the rule as to the state court in Minnesota. . . At common law the public pays no costs, in England the King does not, and the state here, it is said, stands in the place of the King. So it is insisted that, when the state is brought into this Court as a defendant in error in a criminal proceeding, and the judgment of the Court goes against it, costs can not be awarded against the state because it is a sovereign.
>
> That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true.

After citing authorities on this the learned Chief Justice continued:

> But is the state to be regarded as the sovereign here? This Court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.
>
> For many years, costs have been awarded by this Court against states. Under the judicial article of the Constitution, the original jurisdiction of this Court includes suits to which a state is a party. There have been many boundary and other cases brought here by one state against another in which costs have been awarded against one of them and often against both. Uusually they have been divided, but if the case proves to be a "litigious case," so-called, all the costs have been assessed against the defeated party.

The inherent authority of the Court to allow costs, even in the absence of a statute, was asserted:

> A rule of this Court as to the awarding and division of costs is, of course, not a statute, but such a rule seems to us to be within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction, except the sovereign government. This view is supported by the history of Rule No. 37 of this Court in the January Term of 1831, 5 Pet. 724. That shows that, against the dissent of Mr. Justice Baldwin, this Court adopted a rule imposing costs against a defendant for a transcript of record in cases of reversal. The dissent was based on the ground that no costs could be imposed by this Court by rule without specific authority of a statute.

The propriety of making a distinction between civil and criminal cases where a state was a litigant was denied in the following portion of the opinion:

> It is insisted that, while in civil cases costs may be awarded against a state as a litigant before this Court, the rule does not apply in criminal cases. As the objection to taxing costs against a state has been because of its sovereign character, and that, as we have said, has no application to a state as a litigant in this Court, there would seem to be no more reason for immunity in a criminal case than in a civil one.

The opinion was concluded as follows:

> The costs here incurred are in a litigation brought by writ of error into this Court to test the validity under the Federal Constitution of a staute of the state. The incidents of the hearing are those which attach to the regular jurisdiction of this Court. We have had our Clerk make an examination of our records reaching back to 1860. There were one hundred twenty-nine cases examined, which do not include the boundary cases between states on the original docket already referred to. It thus appears that since that date the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it, under the Rule which is now section 3, Rule 29, of our present Rules. That rule in different forms, and under a different number, has been in force since the February, term, 1810. . . It has been in its present form since the January term, 1858. . . We think that the rule construed by long practice justifies us in treating the state just as any other litigant and in imposing costs upon it as such, without regard to the inferences sought to be drawn from *United States ex rel. Phillips v. Gaines.*
>
> If specific statutory authority is needed, it is found in section 254 of the Judicial Code, which first appeared in the Act of March 3, 1877, c. 105, 19 Stat. 344, and was re-enacted March 3, 1911, c. 231, 36 Stat. 1087, 1160. It provides that there shall be "taxed against the losing party in each and every cause pending in the Supreme Court" the cost of printing the record, except when the judgment is against the United States. This exception of the United States in the section with its emphatic inclusion of every other litigant shows that a state as litigant must pay the costs of printing, if it loses, in every case, civil or criminal. These costs constitute a large part of all the costs. The section certainly constitutes *pro tanto* statutory authority to impose costs generally against a state if defeated.

The case was argued by Mr. Clifford L. Hilton, Attorney General of Minnesota, for the defendant in error.

Taxation—Income Tax

The income from lands of Indians being not subject to State taxation and it being assumed that such income in the hands of the Indians is not subject to the Federal Income Tax, held nevertheless, that the income derived by others under leases of Indian lands is subject to the tax on incomes.

Heiner v. *Colonial Trust Co.*, Adv. Op. 29; Sup. Ct. Rep. Vol. 48, p. 65.

The respondent's decedent obtained an oil lease from the Osage Indians, the lessor reserving as royalties a certain percentage of the gross proceeds from the sale of oil. An income tax of more than $800,000 was assessed against the net income of the decedent as derived from the sale of the oil. The respondent brought this action to recover the tax on the grounds that since the interests of the Indians were concerned the lessee was impliedly exempt from the tax.

The District Court and the Circuit Court of Appeals both held that the respondent was entitled to recover the amount paid to the Government and a writ of certiorari was granted by the Supreme Court of the United States. In an opinion delivered by MR. JUSTICE STONE the decision was reversed by the latter Court.

Referring to the income tax acts, he said:

> These statutes in terms plainly embrace the income of a non-Indian lessee derived from the lease of restricted Indian lands. But we are reminded by respondent that both the lease here involved and the income it brings the lessee are beyond the taxing power of the states, for the lease is merely the instrument which the government has chosen to use in fulfilling its task of developing to the fullest the lands and resources of its wards, and a

state may not by taxation lessen the attractiveness of leases for such a purpose.

The contention that Congress, by exempting the income from state taxation, showed its intention to exempt the income from the federal tax was rejected for reasons explained as follows:

> The power of the United States to tax the income is undoubted. It seems to us extravagant, in the face of the comprehensive language of the statute, to infer that Congress did not intend to exercise that power merely because, in the absence of congressional consent, it is one withheld from the states or because the tax in terms imposed on others may have some economic effect upon the Indians themselves. The disposition of Congress has been to extend the income tax as far as it can to all species of income, despite immunity from state taxation. During the period now in question the compensation of many federal officials was subject to federal income tax, and income from government bonds was taxed except when expressly exempted.
>
> Assuming that the Indians are not subject to the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred, and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians.

The opinion was concluded with the suggestion that had Congress intended to create the exemption urged it would have so indicated in the numerous corrections and revisions of the act, lately made, especially in view of the fact that the Treasury Department has consistently collected large sums in the form of income taxes on the incomes of lessees of Indian oil lands.

The case was argued by Mr. John W. Davis for the respondents.

Taxation—Tax on Gifts Inter Vivos

The Revenue Act of 1924 imposing a tax on gifts inter vivos is invalid as applied to gifts made prior to June 2, 1924, the date of approval of the Act.

Blodgett v. Holden, Adv. Op. 67; Sup. Ct. Rep. Vol. 48, p. 105.

The question presented for determination in this case was certified by the Circuit Court of Appeals to the Supreme Court in form as follows:

> Are the provisions of Sec. 319-324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional insofar as they impose and levy a tax upon transfers of property by gifts inter vivos, not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?

Section 319 of the Revenue Act of June 2, 1924, provided that "for the calendar year 1924 and each calendar year thereafter" a specified tax should be imposed on gifts, varying with the amount of the gift. Section 320 dealt with gifts in property and transfers for less than a fair consideration. Section 321 allowed deductions. Section 322 was unimportant in this case. Section 323 and 324 referred to the time and method of making return of the property and of paying the tax.

By Sec. 324 (a) of an Act of February 26, 1926, Sec. 319 was changed to read:

> Sec. 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly. . . ."

Section 324 (b) provided that above amendment should take effect as of June 2, 1924.

The facts of the case were that before June 2 in the calendar year 1924 Blodgett, the plaintiff, a resident of the United States, transferred property by gifts *inter vivos* and not in contemplation of death, valued at upwards of $850,000; after that date he made gifts valued at $6,500. It was undisputed that the gifts made prior to June 2, were made in January, 1924. The donor was taxed for these gifts under the Act of 1924, as amended. He brought this action to recover the sums so paid on the ground that the Act as applied here violated the Fifth Amendment.

In an opinion delivered by MR. JUSTICE MCREYNOLDS the Supreme Court answered affirmatively the question certified to it, and held that as to the gifts made in January, 1924, the statute was invalid.

In his brief discussion of the case the learned Justice said:

> The brief in behalf of the Collector sets out the legislative history of the gift tax provisions in the Revenue act of 1924 and shows that they were not presented for the consideration of Congress prior to February 25 of that year. We must, therefore, determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it.
>
> In *Nichols v. Coolidge* (May 31, 1926) this Court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

MR. JUSTICE HOLMES delivered a concurring opinion in which he was joined by MESSRS. JUSTICE BRANDEIS, and STONE. In this opinion the view was taken that it was not intention of Congress as expressed in the statute to apply the tax to gifts such as was here involved. The learned Justice said:

> Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.
>
> . . . . .
>
> If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it in that way now.
>
> . . . . .
>
> A reasonable interpretation is that the reduction and the tax operate alike on gifts after that date. Taking both statutes into account, and the principles of construction to which I have referred, I think it tolerably plain that the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule "would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

The case was argued by Mr. Mark Norris for John W. Blodgett and by Special Assistant to the Attorney General Alfred A. Wheat for the Collector.

Taxation—Income Tax—Deduction of Worthless Debts

Where a seller fails to perform his contract to deliver goods and loss thereby results to the buyer who has paid therefor in advance, the loss is a debt properly deductible in the income tax return for the year in which it is ascertained to be worthless and is charged off and it is not deductible as a loss in the year in which the advance payment was made.

Lewellyn, Collector of Internal Revenue, etc., v. Electric Reduction Co., Adv. Op. 33; Sup. Ct. Rep., Vol. 48, p. 63.

The Electric Reduction Company sued to recover income taxes which it paid for the year 1918. In July of that year it contracted with one Jouravleff for the purchase of tungsten ore to be delivered to it monthly. By the terms of the contract the company was required to accept a bill of exchange for $30,000 to be applied against the price of the first carload of ore, and it performed by accepting such a bill of exchange on advice of the selling broker that the ore would be shipped on a certain day. In fact very little of the ore was ever delivered, so that a balance was due the company of $27,000 from the seller.

In March, 1918, the company instituted three suits to recover this sum, one against the seller, another against the broker, and the third against the banker who negotiated the bill of exchange. Judgment secured against the seller in 1919 was not satisfied. In the action against the broker judgment was rendered for the broker in 1922. The action against the bankers was discontinued as useless by reason of their bankruptcy.

The company carried the item on its books under "bills receivable," and did not deduct it as a loss in 1918. After the termination of all litigation for recovery of the sum in 1922 the company filed an amended tax return deducting the $27,000 as a loss and brought this suit to recover the alleged overpayment of the tax.

The Revenue Act allows as deductions:

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise."

"(5) Debts ascertained to be worthless and charged off within the taxable years."

The trial court made special findings and held with the defendant thus ruling that the loss was upon a worthless debt deductible under sub-section (5) and not a loss sustained in 1918 under sub-section (4). But this was reversed by the Circuit Court of Appeals. Finally, however, the Supreme Court of the United States held that the result reached by the District Court was the correct conclusion and affirmed its judgment.

The reasoning adopted as correct in leading to this result was expressed as follows by MR. JUSTICE STONE, who delivered the Court's opinion:

> We assume without deciding, as was assumed by both courts below, that sub-section (4) and sub-section (5) are mutually exclusive so that a loss deductible under one may not be deducted under the other. We may assume also that upon the abandonment of the contract by the seller the buyer might have maintained an action to recover the balance of the money which he had paid. But so far as appears from the record there had been no abandonment by the seller in 1918. Throughout that period the buyer was calling for deliveries and some were made as late as in December. The buyer's rights were upon a contract for the delivery of merchandise and were not a "debt" in either a technical or a colloquial sense. We conclude that if respondent's contract rights became worthless in 1918 he was not required to deduct his loss as a worthless debt under sub-section (5), but was entitled to deduct it under sub-section (4) as a loss sustained in that year.
>
> But we do not think that a loss resulting from a buyer's prepayment to a seller who proves to be irresponsible is necessarily sustained, in the statutory meaning, as soon as the money is paid. The statute was intended to apply not only to losses resulting from the physical destruction of articles of value but to those occurring in the operations of trade and business, where the business man has ventured on a course of action in the reasonable expectation that the promised conduct of another will come to pass. Not only the future success of the business but its present solvency depends on the probable accuracy of his prophecy. Only when events prove the prophecy to have been false can it be said that he has suffered. His case is not like that of a man who fails to learn of the theft of his bonds or the burning of his house until a year after the occurrence; but rather resembles the position of a merchant who buys in one year, for sale in the next, merchandise which shifting fashion renders unsalable in the latter. It may well be that he whose house has been burned has sustained a loss whether he knows it or not and may recover a tax paid in ignorance of that material fact. But we cannot say that the merchant whose action has been based not merely on ignorance of a fact but on faith in a prophecy—even though the prophecy is made without full knowledge of the facts—can claim to have sustained a loss before the future fails to justify his hopes.
>
> Here the only fact relied upon to show a loss is the outcome of the litigations two years after respondent's payment to Jouravleff. There is nothing in the findings from which we could conclude that the respondent in 1918 had ceased to regard his rights under the contract as having value or that there was then reasonable ground to suppose that efforts to enforce them would be fruitless. On the findings respondent is not entitled to recover.

The case was argued by Assistant Attorney General Herman J. Galloway for petitioner and by Mr. S. Leo Ruslander for the respondent.

State Taxation—Tax on Government Bonds

A state license fee on a domestic corporation fixed at a certain percentage of the corporation's gross income is unconstitutional so far as the income from United States bonds is included in determining the gross income of such corporation as the basis for the license fee.

Northwestern Mutual Life Insurance Co. v. Wisconsin, Adv. Ops. 65; Sup. Ct. Rep., Vol. 48, p. 55.

A Wisconsin statute imposed an annual license fee on domestic life insurance corporations. The fee was fixed at three per cent of the gross income excepting income from real estate taxed and from premiums collected on policies and annuity contracts. The fee was in lieu of all other state taxes except taxes on real estate owned by the corporation.

The plaintiff in this case sought to recover excess taxes which it had paid over a period of five years. The taxes sued for were paid out of the income derived from United States bonds. The contention of the plaintiff was that the income from these bonds was exempt from State taxation and that therefore the tax levied on the income from these bonds was unconstitutional. The State revenue officers took another view and it was argued for them that the tax was for granted privileges measured by gross income and therefore valid even though part of the income was from federal government bonds.

The Wisconsin courts sustained the contention of the revenue officers and the case was brought before the United States Supreme Court on writ of error. There the decision was reversed and the tax

held unconstitutional in an opinion delivered by MR. JUSTICE MCREYNOLDS.

The essential reasoning in support of the decision was expressed as follows:

> It cannot be denied (and denial is not attempted) that bonds of the United States are beyond the taxing power of the states. Certainly since Gillespie v. Oklahoma it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged Act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void.
>
> The fundamental question, often presented in cases similar to these, is whether by the true construction of the statute the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation.
>
> Section 76.34 undertakes to impose a charge not measured by dividends paid, as in Home Insurance Co. v. New York, nor by net income, as in Flint v. Stone-Tracy Co., and those cases are not controlling. The distinction between an imposition the amount of which depends upon dividends or net receipts and one measured by gross returns is clear.
>
> It is important to observe that although a state statute may properly impose a charge which materially affects interstate commerce without so unreasonably burdening it as to become a regulation within the meaning of the Constitution, no state can lay any charge on bonds of the United States.
>
> Here the statute undertook to impose a charge of three per cent upon every dollar of interest received by the Company from United States bonds. So much, in any event, the State took from these very receipts. This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the state.

The case was argued by Messrs. Sam T. Swansen and George Lines for the plaintiff in error and by Mr. Franklin E. Bump for defendant in error.

REFORMS IN FEDERAL PROCEDURE

Need to Invoke Aid of Business World in Order to "Put Beef" Behind Plans Presented to Congress for Improvement of Procedure—Weak Link of Federal Administration of Criminal Law Is the Petty Offense—Summary Jurisdiction for U. S. Commissioners and Federal Courts in Such Cases Would Increase Efficiency—Constitutional Aspects—Other Measures

BY CHARLES H. TUTTLE
U. S. Attorney for Southern District of New York

THE essence of democracy is law. Other systems of government rest upon personal authority, but in a democracy there must be no master but the law. A democracy is a thing of the spirit. Like the Kingdom of Heaven, it is a thing within. It is the collective expression of the self-governing capacity of all its members. In their right of contribution to that collective expression all are sovereigns, and in their duty to obey, all are subjects. Thus the paradox of democracy is, that the command of all means the obedience of all. The name for that paradox is Law.

Hence, in a democracy the administration of Law is a most grave and delicate matter. Lawlessness is an anti-social and anti-democratic disorder which may infect the very body of the law itself. There is the lawlessness of the criminal; and there is also that other lawlessness which kills the spirit with the letter; which finds in Procedure ready pathways to injustice, and which by a weak and fumbling administration of the law allows to the license of self-interest, freedom from these common obligations upon which must rest orderly liberty.

Hence, Law and its Procedure require constantly to be geared anew to each other in accordance with new conditions. To be sure, in the very nature of things, stability is an essential element of law; but, on the one hand, just as the sour cynic counselled against touching the church, because in his view it was the last great bulwark against religion, so there are men who counsel against touching the law because (so their reasoning suggests) it is the last great bulwark against Justice.

Today the imperfections of legal procedure are universally discerned and decried. True it is that the law's delays and difficulties are no newly discovered evil. Hamlet included them in his gloomy catalogue of "ills we have"; and in contemporary times a long procession of our distinguished jurists led by Mr. Root, Mr. Hughes and Chief-Justice Taft have declaimed against the system in language that was the more sensational because falling from such careful lips.

Why, then, so much failure to act? Mr. Root gave one explanation drawn from his experience in The Senate. Working constantly to secure reforms in Federal Procedure recommended by the American Bar Association he accounted as follows for failure:

> "But while we are all for reform, we are mildly for reform; we don't put any 'beef' behind it. Nobody is in danger of being run over by it if he gets in the way."

And to this statement of Mr. Root, one might add the declaration in the leading editorial in last August's Journal of The American Judicature Society, that:

> "We need to admit the importance of external pressure, of lay and journalistic agitation, to bring home to lawyers the intense dissatisfaction which the public feels. It is all but im-

*Address delivered before the Association of the Bar of the City of New York on Oct. 6, 1927.

possible for the lawyer to look at our system and its products with fresh, unprejudiced eyes."

Another illuminating expression may be found in the address made last August by former-Governor Whitman, speaking as President of the American Bar Association. Recalling that for ten years Congress has had before it the Uniform Procedure Bill, giving to the Supreme Court of the United States power to make general rules for practice and procedure in actions at law in the Federal Courts, which are now bound to borrow their practice from forty-eight different States, President Whitman said that, although "at the last session of Congress ninety-two Senators and over eighty percent of the House of Representatives committed themselves in favor of the Bill, the opposition of a small minority was effective in defeating this reform measure." The ground of this small but successful opposition seems to have been that "the people" must keep their hands on procedure. The Supreme Court of the United States, according to this opposition, may (as it does) control procedure in admiralty, copyright, bankruptcy and equity; but if it made uniform rules for the common law courts, the unaccustomed freedom from legal technicality and diversity might be injurious to the unacclimatized liberties of the lawyers and the people. The Opposition seems unable to recall that the English Rules Committee, composed of judges and lawyers, have for fifty years been undisturbed by Parliament in the exercise of the fullest power over procedure; and that nevertheless English liberties have not been engulfed.

The Committee of the American Bar Association in charge of this vital reform, in its Report of last August, declared that although nothing exceptional is involved in thus rounding out the rule-making power of the Supreme Court, the only hope of overcoming "the deadly influence" of a few powerful Senators was by pressing into service all organs of public opinion, precisely as English lawyers and laymen achieved procedural reform and liberty through the cooperation of the daily press after fifty years of struggle with an obdurate Parliament.

Only by some such effective emancipation of Federal Procedure from servitude to the veto power of individual members of Congress, can that procedure be readily simplified and modernized. As the Report of this Committee on Uniform Judicial Procedure declares—in a spirit of some exasperation:

"There ought to be some way of overcoming a personal legislative influence of a character that can defeat a majority, the public will, and the administration of justice, by smothering bills in committee."

The Committee, therefore, calls upon every State Bar Association and every member thereof, and upon the press, to put "beef" behind the representations made to their State Congressional delegation in favor of the pending bill. It is a privilege to echo here the Committee's trumpet call.

This problem of how to put "beef" behind efforts to modernize legal procedure will in part be solved if the aid of the business world be invoked. Business has a greater stake than ever before in law. To-day Law has become part of the business of business. More than ever is business regulated by law; dependent upon the observance of law; and vitally concerned in the efficiency of the machinery of law. The law now makes the environment and prescribes the rules under which business is done. Hence, as never before, it is true that without the law-abiding spirit there can be no sustained progress, moral or material, in civilization. The efficiency of American commerce is in disturbing contrast to the efficiency of American Justice. The former moves to the conquest of the world; the latter too often moves with leaden feet in its own circuit. Hence the business man is interested even more than the lawyer in legal reform. A feeble and fumbling administration of the criminal law exposes commerce to depredation, and weakens the resistance of its servants to temptation. A slow and expensive civil procedure loosens the obligation of contracts; multiplies false claims and defenses; undermines confidence, and checks the free flow of credit. For this reason Mr. Justice Edward R. Finch, of our Appellate Division, hit on the head the nail of the present situation when at the recent meeting of the American Bar Association he persuaded its Judicial Section to ask the Executive Committee to consider the feasibility of requesting leading business organizations and other appropriate lay organizations, to appoint a representative to the present committees of the Association or to a relatively small special Committee of the Bench and The Bar, "to survey the organization, rules and methods of procedure and practice of the courts, ... and to report whether the growth of the administration of justice has been commensurate with the rapid advance of business."

This proposal, while novel in this country, has abundant precedent in England, where the struggle in procedural reform was not won until in 1851 Parliament began the practice of placing distinguished laymen on its committees, to consider the state of the law and the courts. Indeed, the select committee of ten, appointed by Parliament in 1909, had but one lawyer upon it—much to the exasperation of Mr. Justice Grantham—who, when called as a witness before these investigating laymen, cried out in protest:

"On behalf of the common-law judges of England I most respectfully but seriously protest against these proceedings. Such proceedings are unheard of in the history of England or of English Law."

I believe, therefore, that the proposal of Judge Finch, if finally adopted, will in this country open to law reform a way of triumph quite as complete as did similar measures in England. Certainly it will leaven with efficiency the movement for reform, and will enlist the powerful influence of the business world in the putting of "beef" behind the representations to Congress.

As said last August in a leading editorial in the Journal of the American Judicature Society, under the caption "The Bar needs to cooperate with laymen,"

"The Bar may be said to have a sort of veto power in the Legislatures. And it should have learned by this time that it has so little affirmative power in legislatures, that it very much needs for its measure the support of all interested citizens and of all worthy newspapers."

The weak line in the Federal Administration of the criminal law is the petty offense. In our State system we have marked out a scientific summary jurisdiction whereby the small offender is

summarily dealt with by local magistrates; more important offenders in the misdemeanor class are tried without jury by the Court of Special Sessions; and jury trial as a matter of right is in general reserved for the grave offenses classed as felonies.

The Federal system has neither such machinery nor such classification. Whether the penalty be a fine of ten dollars or jail for ten years, the procedure must, except in certain narrow instances, be before a Grand Jury and a petit jury.

There are but three possible means of loosening so tight a straight-jacket. The first is to undertake to reduce the number of constantly multiplying statutes and regulations which create these minor offenses. But the increasing complexities of modern life and of government, and the habit which is becoming fixed, of regulating human conduct more or less minutely by legislation, indicate that statutes creating and defining petty offenses are much more likely to increase than to diminish.

The second possible course is for the courts and for the public prosecutors—particularly in very populous centers—frankly to announce that they must curtail their efforts to administer the law as regards small offenses. But such a course allies the law with lawlessness; makes government by law more a theory than a reality, and infects with gross abuses the administration of justice. The arrest of minor offenders without ultimate prosecution, incubates numerous parasites who commercialize the necessity and ignorance of the poor, while under temporary restraint.

The third possible course is to confer upon the United States Commissioners and Federal courts, summary jurisdiction over petty offenses, and thus to place the federal system on a parity of efficiency with the State system. Effort to this end has always encountered the assumption that two prohibitions in the United States Constitution barred the way. The first is the familiar requirement that the trial of "all crimes" shall be by jury; and the second is the provision that in all "criminal prosecutions" the accused shall enjoy the right to a speedy and public trial by an impartial jury. Notwithstanding the breadth of these guarantees, we must approach their consideration holding ever in mind the caution by our Supreme Court, that the language of the Constitution must be read in the light of the fact that the great statesmen and lawyers who framed it, and afterwards brought about its ratification, were living in the atmosphere of the Common Law and using its vocabulary. Hence, while the language of that instrument faces forward, so far as its effect is concerned, its parentage is in the past; and the Supreme Court has in two instances pointed out with reference to these two provisions, that this caution must be held firmly in mind, because from time immemorial at common law the expression "all crimes" or "crimes" was a term applicable only to major offenses.

Blackstone's great Commentaries were published just twenty years before the United States Constitution was framed, and its circulation is said to have been larger in this country than in England. Hence, as the Supreme Court has said, the framers of the Constitution undoubtedly had in mind the fact that Blackstone classed as "crimes" only such offenses "as are of deeper or more atrocious dye," in contradistinction to those "smaller faults and omissions of less consequence" which are comprised under the gentler term of "misdemeanors"; and that at common-law minor offenses were from time immemorial proceeded against summarily in any tribunal legally constituted for that purpose, without indictment by Grand Jury or trial by petit jury.

In consequence, our Supreme Court, both in the case of Callan vs. Wilson, 127 U. S. 540, and in Schick vs. United States, 195 U. S. 65, has strongly intimated that the provisions of the Federal Constitution requiring of the Federal Courts the trial of all crimes by Jury, apply only to such offenses as were not misdemeanors as defined in Blackstone's Commentaries and by the contemporaneous law, and as did not involve danger to society or serious infraction of the moral law.

In the Schick case, the Supreme Court held that a penal proceeding under the Oleomargarine Act to inflict a penalty of Fifty Dollars was a "petty offense," and that "in such a case there is no constitutional requirement of a jury."

In every case where the Supreme Court has held a trial by jury to be a matter of right under either or both of the aforesaid constitutional guarantees, the offense involved a serious infraction of the moral law or of public safety, and, according to Blackstone's classification, was a "crime" rather than a "misdemeanor."

The same interpretation is necessarily arrived at through consideration of the constitutions of the thirteen original States which first ratified the Federal Constitution.

At the time of the separation of the colonies from the Mother Country, the summary jurisdiction of the English magistrates was well settled, and covered a great volume of offenses. Bacon's Abridgement in 1768 described summary power of the justices over inferior offenses as extending "to such a multiplicity of cases that it is endless to endeavor to enumerate them." The Colonial Charters had carried forward the English judicial system; the legal atmosphere of every community was permeated with the principles and methods of the common law; and when these Colonial Charters gave place to State Constitutions, the enshrinement therein of trial by jury was not deemed inconsistent with the continued practice of summary power by magistrates over minor offenses.

For example, the early Constitution of the State of New York was typical of all the others in the provision that trial by jury in cases where it had heretofore been used by the Colony of New York, should remain inviolable forever. Yet, notwithstanding this provision, our State courts have repeatedly held that misdemeanors and petty infractions of law could be summarily tried without jury. These holdings are eloquent proof of the universal rule in the period when constitutions were being framed, that the guarantee of trial by jury was not intended to supplant or repeal the settled summary jurisdiction of common law courts and magistrates over petty offenses.

Definition of what constitutes a petty offense may be difficult. The Supreme Court in the Schick case has suggested that the nature of the offense and the amount of punishment prescribed, rather than its place in the Statutes, determine its classification among serious or petty offenses; and the dictum of Mr. Justice Harlan, in his dissenting opin-

ion, that a jury trial is necessary whenever the punishment involves or may involve deprivation of liberty, is not in accord either with the authorities or with history. Undoubtedly, also, consideration should be given to the moral values and to the gravity of the danger to the community. Dealing with a question of degree is a problem not unfamiliar to the courts, and presents, as said by the Supreme Court in Irwin vs. Gavit, 268 U. S., 161, a question which is "in pretty much everything worth arguing in law. Day and night, youth and age, are only types."

I believe, therefore, that there is nothing in the Federal Constitution which prevents authorization by Congress of summary jurisdiction on the part of the United States Commissioners and judges in dealing with petty offenses; and that constructive measures so sorely needed to remove the existing menace to the proper administration of the Federal criminal law, need not be deemed to be vetoed by abstract questions of constitutional power.

In this view of the matter, the creation of new and inferior federal courts would not be necessary, and indeed would tend to raise more troublesome questions than it would settle. The existing judicial instrumentalities are sufficient. All that is required is the extension to them of ancient and historic common law power. Congress could prescribe quite as readily as did the Legislature of the State of New York, a list of offenses which, according to the law antedating the Constitution, were classed as petty, and subject to summary punishment without indictment or trial by jury; and Congress could easily devise a simple procedure for the laying of informations and for summary trials before the United States Commissioners and district judges. Indeed, as I am advised, a bill to this very end has already been drafted by a distinguished group in this Association; but I am reluctantly compelled to doubt the constitutionality of that provision therein which authorizes a district court, unaided by any definition, to pronounce "a criminal case" to be "petty," thereby cutting off trial by jury; and to make applicable any existing maximum penalty not in excess of three months imprisonment without hard labor or a fine of five hundred dollars or both. Such a provision would enable a district court to exclude trial by jury in *any* criminal case, however grave the name or character of the offense, where in advance the court felt disposed to a moderate penalty upon conviction. I also doubt the constitutionality of the attempt in this draft bill to classify as a petty criminal case any offense where the punishment prescribed by existing laws does not exceed imprisonment for six months or a fine of $1,000. No such dividing line was known to the common law at the time of the adoption of the Constitution.

I realize that before a reform of this character can express itself in legislation, public opinion must be sharply attracted to the existing evils and must be informed that the proposal in no way removes the jury system from its ancient historical moorings.

Until some such reform is adopted, or the repeated recommendations of our Bar Associations and of the Judicial Conference, that three additional judges be created in this Federal District, are accepted by Congress, no comprehensive solution of the congestion of our civil and criminal calendars is possible. The facts so demonstrate. Our six local judges exactly equal in number the six distinct daily activities of the court, to-wit: common-law, criminal cases, equity, admiralty, bankruptcy and motions. A long case in any one of these parts of the courts, or the illness of any judge, causes the calendar to fill up like a river behind a dam; and the inundation grows with the steady increase of business in the federal courts. On the other hand, with additional judges the congestion can be reduced at least until they also are overflowed with the rising tide of federal litigation. During last summer, when traditionally courts should be marking time, we secured the attendance of four judges from other districts, and gave much of our vacation period to catching up on the arrears of our criminal and civil business. During those three months we secured 2,127 convictions, suffered 25 acquittals, collected $55,054 in fines; and discontinued 205 very old and defunct cases. These convictions were only about 200 less than had been obtained by the office during the entire preceding year. In addition, on the civil side, we collected $308,000, and by disposing of 215 civil cases made a net gain of 68. But the visiting judges are now gone, and we are reduced for October to a single criminal and a single civil term of court, with the result that the neck of the bottle is again too small.

Parenthetically, while speaking of summer justice, I can affirm that our experience of the last three months has demonstrated that the frequent assertion that trial work must be suspended during the summer because juries would be hard to obtain, rests upon no basis of fact. On the contrary, during this period when ordinary business is usually slack, business men find it easier to serve than at other periods.

Nevertheless, notwithstanding these efforts, the number of all civil and criminal cases on the calendars of the Federal Courts in the Southern District of New York, totalled about 14,000 as of June 30, 1927. What powers, resident in the court, may be utilized to decrease this congestion?

In the first place, I venture repeatedly to believe that the Federal judges too seldom employ the power to have a preliminary investigation of the facts in common law cases. The congestion is chiefly due to long cases which occupy the time of the only available judge to the exclusion of a multitude of smaller cases, and which in many instances involve facts and figures far too intricate to be held in mind by a jury. A preliminary investigation in such cases by an auditor would not only simplify the issues, but in the majority of instances would end the suit without occupying the time of either judge or jury.

In Ex-parte Peterson, 258 U. S. 300, the Supreme Court held, in an action at law for goods sold and delivered, that the Federal Court could appoint an auditor to take testimony, to ascertain the facts, and to make upon the merits a report which would function before court and jury as prima facie evidence of the facts found and conclusions reached, unless rejected by the court. In the unreported case of Thompson-Starrett Company vs. LaBelle Ironworks, affirmed by our Circuit Court of Appeals in 17 Fed. (2nd) 536, this power

to appoint an auditor with these functions was recently exercised by Judge Augustus N. Hand in an action at law for unpaid instalments upon a building contract. Surely, it would not be difficult in centers where calendars are congested to find a body of distinguished lawyers who would be willing once or twice a year to act as such auditors (or even as referees, where the court might so desire) without compensation and in a spirit of public service, in order to aid the courts in thinning the calendar. A somewhat similar expression of faith in the devotion of the State Bar has lately been made by the Special Calendar Committee in advancing its proposal that distinguished lawyers be temporarily designated without compensation, to conduct jury trials; but, whereas the Committee's plan would require state legislation, the appointment of auditors by the Federal Courts in jury cases requires neither legislation nor the consent of the parties.

Two matters of calendar practice may also be noted. Experience this summer has proven that common-law jury cases can be successfully tried during that period with the aid of visiting judges, but the Bar seemed to have gained the impression that a trial during the summer was wholly optional, with the result that early in August the entire calendar broke down and the term was closed, to be resumed in September when enough brand new cases had accumulated. The older cases had eluded the court until October. Timely judicial announcements and insistence that in the handling of the calendar no distinction in seasons would be recognized, would, I believe, lend seriousness to the summer calendars. Moreover, on the periodical calls, the strict enforcement of the "ready or off" rule will give that rule the effectiveness which it has in the Supreme Court in Kings County. Cases which are not ready on those calls should as strict matter, of course, be forced to yield to those which are.

Furthermore, the success of one of the experiments adopted in the State Supreme Court at the instance of the Special Committee on Congested Calendars appointed by the Appellate Division, First Department, is worthy of attention by our Federal Courts. On May 1, 1927, there took effect the law increasing the fee for filing a note of issue in the State Supreme Court from Three dollars to Twenty dollars. The first effect was a concentrated rush to file notes of issue just before the new law went into force, with the result that in April, 1927, more than twice as many notes of issue were filed as in April, 1926; but, on the other hand, comparing the whole period from April 1st, to September 30th in each year, there was a net reduction in 1927 of 2,582. Moreover, while seventy-five percent of the notes filed for the October Term, 1926, were in cases growing out of personal injuries; only fifty-five percent of the notes of issue for October, 1927, were of this character—thus indicating that a larger proportion of negligence cases was being settled before suit in order to escape the increased filing fee. Since negligence actions are also a chief source of congestion in the Federal courts, the moral is obvious. At present no filing fee, as such, is required at all, the only requirement being a Ten Dollar deposit to meet subsequent small fees. Any unused portion of this deposit is returned at the close of the case. If a substantial filing fee, as such, were required, then, as the recent experience of the State courts prove, an immediate and large reduction in new suits would ensue.

There are other effective but simple procedural reforms which can be accomplished through legislation. Such for example is the abolition of the confusing and antiquated modes of seeking a review in Federal Courts of Appeal, and the substitution therefor of a simple notice of appeal in accordance with the State practice. A bill to this end has been introduced in Congress by the American Bar Association.

The American lawyer, lost in the jungle of Federal Appellate Procedure, will envy his English brother who moves in such wide-open spaces that Professor Sunderland in the Journal of the American Judicature Society for April, 1926, was able to say of him:

> "The English Practice in taking an appeal so successfully meets its theoretical aim that there is almost no way of making a mistake. Nothing is required but the ability to read and to operate a typewriter. Bills of exception became obsolete in England so long ago that some of the oldest men now in the law-court offices never heard of them. Assignments of Error have also gone the way of the Cross-Appeal, the writ of error and the other extinct monsters of the cave-dwelling period of the English Law. To perfect an appeal, the English barrister serves a notice upon the respondent that he will move the Court of Appeal in fourteen days to reverse the judgment. . . . There are no abstracts, or condensations, or reductions to narrative form, to be worked out, wrangled over, and settled. The Appellate record is merely a copy of existing documents. There are no exceptions."

Not only is the system of review by Federal Courts of Appeal antiquated and cumbersome, but on the criminal side it furnishes the convicted defendant with every inducement to appeal and with golden opportunities for delay. If he loses, he is not penalized; and in any event has he not been out on bail in a bright Mañana-land, where he sees no reason for unmannerly haste? Hence, it was something of a revelation when last summer Lord Chief Justice Hewart unfolded the workings of the English Court of Criminal Appeal, in an Address before the Canadian Bar Association. He disclosed, that frivolous appeals and designedly dilatory tactics were both prevented by the simple but efficient expedient of adding automatically to the sentence the time consumed by the appeal in cases where the defendant was on bail. Moreover, the Court possessed, but used less than once a year, the power to increase a sentence upon appeal against a sentence. The result of these simple reforms in procedure has been astonishing. The number of appellants has been only about seven percent of the number having the right to appeal. The court finds it necessary to sit only about forty days a year. The average time from the receipt by the court's registrar of a notice of appeal or application for appeal, until the matter is finally determined, is from four to five weeks. And all this is accomplished, nothwithstanding that the English Court of Criminal Appeal may entertain an appeal upon the facts as well as upon the law, and may consider points not raised in the court below. That purely technical considerations receive a cold welcome and seldom affect the result, is shown by the fact that out of an average of 520 cases a year only 27 are reversed; and in only about thirty-two are the sentences reduced. And, it will be borne in

mind, this Court of Criminal Appeals sits for the whole of England.

The English system of Practice has one other important lesson for the modernizing of federal procedure, to-wit, its method of handling the by-products of every litigation—such as controversies over time for pleadings, bills of particulars, amendments, addition and withdrawal of parties, etc. These are all routine matters which can best be dealt with by judicial officers specializing therein, in relief of overworked judges and congested calendars. The secret of the success of the English system, centers in lifting this burden from the regular courts. In New York State we have 107 Supreme Court judges, in addition to twelve judges of Federal District courts. Yet England, with a population of three times that of New York is disposing of her similar judicial business with about one-fourth of the number of judges. A chief reason is that from the outset of every law-suit its routine controversies and procedural matters are under the jurisdiction of Masters, who discharge their functions in rooms where the total absence of chairs implies that no one is expected to linger. On the hearing before him, the Master gives direction for the speedy expedition of the case and settles all interlocutory matters preceding the trial. Thus, the lawyers are not, as here, the sole arbiters of the preliminary course of a case. We have in bankruptcy a somewhat similar system in the person of Referees in bankruptcy. The courts could not function without them. Common-sense would urge the extension of that precedent along lines which the English experiment has demonstrated to be sound.

No survey of Federal Procedure would be complete, without pointing out its total lack of machinery for detecting and punishing repeating offenders. In this respect it is out of touch with modern Penology, which predicates reformation for the first offense and increasing severity for repetition.

The Baumes Laws are an illustration of scientific methods in dealing with crime; and their success is self-evident. They rest upon the existence of elaborate machinery for detecting by fingerprint, photograph and reference system, the habitual offender; and they provide a scale of penalties graduated according to the number of repetitions. The Federal criminal law, on the other hand, is without even a vestige of this efficient equipment. The second offender can be known only if he is arrested in the same district and is kind enough to give the same name; or, if someone happens to recall the previous conviction. The maximum penalty for an offense cannot be exceeded, whether it be the defendant's first breach of the law or the tenth. Yet there is nothing unconstitutional in such familiar and effective means of detection as fingerprinting and photographing. In Holt vs. U. S., 218 U. S., 245, Mr. Justice Holmes has said:

> "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him—not an exclusion of his body as evidence when it may be material."

Indeed, the Federal criminal system does not even possess in Washington or in the several districts, any bureau where descriptive data are preserved for the purpose of detecting habitual offenders; and there is no appropriation for the compiling of such records. Hence, the Federal system may seem almost to invite description as a sort of happy-hunting ground for the itinerant crook.

A word also should be said as to procedure in bankruptcy, particularly because the Bankruptcy Committee of the American Bar Association reported last August that "the situation is alarming."

According to the Committee's figures, during the last fiscal year there were closed in the United States a total of 47,307 bankruptcy cases, representing liabilities of $806,312,992.45; and the number and amount are constantly growing. It is evident that, however enormous have been the country's opportunities for disregarding loss, we are rapidly reaching a stage where we cannot continue to disregard it. Accordingly, the Committee declares that today it is too easy to go through bankruptcy, and that we should take a leaf out of the English book where discharges are denied when the bankrupt's assets are not equal to fifty percent of his unsecured liabilities, unless by reason of circumstances proven to have been beyond his control; or where he is unable to show that he contracted debt under the reasonable expectation of ability to repay; or when he has brought on bankruptcy through rash speculation or culpable neglect of his affairs. The Committee, in addition, recommends certain procedural amendments and harmonizations too detailed for consideration here, as well as the conferring upon the judges of power to refuse confirmation of competitors, even though no objection be made by creditors.

In closing, let me ask why the English have succeeded in developing a procedure so much simpler and more effective than our own? The answer is that given by Professor Sunderland in a recent issue of the Journal of the American Judicature Society. Our constitutional system has produced a rigidity and timidity even in the matter of procedure. Our reforms are by tinkering, and not by rebuilding. In every other field of American endeavor, efficiency, progress and simplification are being sought with restless and irresistible eagerness. Yet, the legal profession, which controls the operation of the laws to which all the rest of society is subject, is halting between two opinions, and is dismayed by the very size and mass of the problem. Yet a progressive age demands progressive solutions, and what has been accomplished in the Old World can be even bettered in the New World.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

CHARITABLE GIFTS AND THE OLD LAW BOOKS

By Charles P. Megan
Member of the Chicago Bar

WHAT I have to say this evening about our library may seem to be turned upside down; the Chicago Bar Association has always been ready to accept gifts for the purpose of buying books therewith; I am going to talk about books as making gifts to the Association secure.

Stephen Girard, a Philadelphia merchant of French Huguenot birth, died in 1831, a widower, with no children, leaving a fortune of several million dollars. His will contemplated a new college, and the development and beautifying of the city's water-front (the future Delaware Avenue), with aid to State and federal internal navigation as a residuary purpose if all else failed. Along with the clauses of the will that launched these mighty projects he wrote clauses prescribing in almost ludicrous detail how every least part of his plans should be carried out. The chief interest of the will is in a gift of about two million dollars to the city in trust for a purpose outlined in the opening part of the preamble to the will:

> "Whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds . . ."

A subsequent clause has served to make the will famous:

> "I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.
>
> "In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer."

The heirs of Girard attacked the will on three grounds: first, that the city of Philadelphia was incapable of taking such a devise; second, that the description of the beneficiaries of the proposed charity was too uncertain and indefinite to have any legal effect, and that the trust was therefore unenforceable; and third, that the plan of the will was hostile to the Christian religion, and against public policy. On the first and third points I shall not speak, as they are not within my scope this evening, but they were both finally decided in favor of the city and the will. The point about the capacity of the city was not pressed, and the purpose of the founder was held to be the exclusion of sectarianism, not of religion. Both Webster and his fellow-counsel (arguing against the will) said that this was "a cruel experiment . . . upon these orphans, to shut them up and make them the victims of a philosophical speculation . . . to ascertain whether they cannot be brought up without religion. . . . Ministers are the usual and appointed agents of Christ. . . . Different sects have different forms of worship, but all agree that preaching is indispensable." But although Webster outshone all the great preachers within men's memory, and though Binney sighed, "What would I have given if Girard had only begun his will. 'In the name of God. Amen,'" yet the case was never in doubt, directly on this point. Story told Kent that Webster's argument seemed "an address to the prejudices of the clergy," and the court declared it without force " in a mere juridical view, which is the only one in which we are at liberty to consider it." Webster's magnificent peroration was, therefore, in vain: "No good can be looked for from this college. If Girard had desired to bring trouble, and quarrel, and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to that result, it will be the crowning mercy of my professional life."

The second point, however (aided *indirectly* by the last), was a much more dangerous one, and Story had every reason to treat it with respect, for a generation earlier he and his beloved chief, John Marshall, had had the question before them, and had decided it as Webster now contended. In 1819, in *Trustees of Philadelphia Baptist Association v. Hart's Executors,* 4 Wheat. 1, a case from Virginia, the law was laid down thus: At common law a gift was, of course, void if no legal estate vested, or if the description of those who were to take was indefinite and uncertain. Charitable gifts were not an exception to this rule, until the situation was changed by the passing of the Statute of Charitable Uses (43rd Elizabeth). After the statute the chancellor had jurisdiction to give relief in such cases; so that now "if a bequest be for charity it matters not how uncertain the persons or objects may be; or whether the persons who are to take are *in esse* or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried into exact execution or not; in all these and like cases the court will sustain the legacy and give it effect according to its own principles; and, where a literal execution becomes inexpedient or impracticable, will execute it *cy pres.*" Marshall expressed himself as inclined to believe that "the original interference of chancery in charities, where the *cestui que trust* had not a vested interest which might be asserted in a court of equity, was founded on that statute [the 43rd Eliz.] and still depends on it." In Virginia, therefore, which had expressly repealed the 43rd Eliz. between the date of Hart's will and the date of his death, there was nothing to sustain a charitable gift

*Remarks at the annual dinner of the Chicago Bar Association, June 9, 1927, Mr. William C. Boyden, President of the Association, presiding.

to uncertain beneficiaries, and the gift was accordingly held void. Story prepared a learned concurring opinion, which was not published at the time, but was printed several years afterward (1830) as an appendix to the first edition of Peters' third volume of supreme court reports—it was omitted in subsequent editions, for a reason that will be clear in a moment—and Story also wrote an elaborate note on Charitable Bequests, along the same lines, for his personal friend, the supreme court reporter Wheaton, who printed it at the end of the volume (4th Wheaton) containing the case. And, by the way, that fourth volume of Wheaton's reports would be hard to rival for professional interest. It begins with *Baptist Association v. Hart's Executors* and ends with the *Dartmouth College case,* and in between are *Sturges v. Crowninshield* (on the validity of the New York State bankruptcy law) and the great *McCulloch v. Maryland.*

The bequest that was held void in the case of Hart's will was in this language: "Item, what shall remain of my military certificates, at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." The Association was not incorporated until after Hart's death.

As a result of the decision in this case, Maryland followed Virginia in cutting loose from the 43rd Eliz., and the law of Pennsylvania also was considered to exclude the statute; and so, with Webster and the *Baptist Association case* on their side, the Girard heirs had reason to be confident. The case was argued before the supreme court of the United States, and Story and others of the judges were known to be of opinion that Girard's will could not be sustained under the earlier decision. John Sergeant, counsel for the city of Philadelphia, took alarm, and advised engaging Horace Binney to re-argue the case. In important litigation, especially where rights of the public were involved, the supreme court encouraged a very full presentation of the case by both sides, and almost always permitted, and sometimes even suggested, a re-argument. And there was as yet no limitation on the length of arguments; that came five years later. Binney devoted a year to preparation; and the great case came on for final argument in February, 1844. For a description of the scene you must go to the fascinating pages of Mr. Charles Warren's *The Supreme Court in United States History.* Everybody tried to get into the court-room. Two hundred ladies came to hear Webster. They sat behind and around the judges, and everywhere. The newspapers gave full reports of the case from day to day. The arguments lasted ten days in all. Each day the court-room became more crowded. It was usually very hard to get John Quincy Adams away from his seat in the house of representatives, but he went to hear this case. A friend rushed over to the house and told another member, "Long John" Wentworth, the (or at least *a*) famous mayor of Chicago, that "preaching is played out. There is no use for ministers now. Daniel Webster is down in the Supreme Court-room, eclipsing them all by a defense of the Christian religion. . . Then again 'Suffer little *children* to come unto me,' accenting the word, children. He repeated it, accenting the word, little. Then rolling his eyes heavenward and extending his arm, he repeated it thus: 'Suffer little children to come unto *Me,* unto *Me,* unto *Me,* suffer little children to come.'" The great audience hung on the words. Once there was a burst of applause in the court-room. Throughout the country, church people read the newspaper accounts eagerly. Webster was supposed to have been promised a nifty thousand dollar fee if he should succeed in breaking the will. But there was more than that at stake for him; the "church vote" (people said) might mean the realization of the ambition of a life-time; the presidential nominations were only four months away.

It was a struggle of giants. One interesting story is quoted by Mr. Warren. There was a vacancy on the supreme court, caused by the death of Justice Thompson. Binney and Sergeant were attracting such attention by their arguments in the Girard case that President Tyler decided to offer the place to one, and, if he would not accept, then to the other. The President's message was brought to Binney at his hotel-room, the evening after he had completed his masterly four days' argument. He expressed his sense of the honor the President was conferring on him, but (he said) he was too old for the place, being over sixty. He would suggest, however, that the appointment be offered to his colleague, Sergeant, but that Sergeant should not be told that the place had been tendered to Binney, and particularly that the reason for the refusal should not be communicated to Sergeant; for Sergeant also was over sixty, and might be influenced by Binney's decision. Sergeant was in the next room in the hotel, and the President's messenger at once went in and offered him the place on the bench. He expressed his sense of the honor the President was conferring on him, but (he said) he was too old for the place, being over sixty. He would suggest, however, that the appointment be offered to his colleague, Binney, but that Binney should not be told that the place had been tendered to Sergeant, and particularly that the reason for the refusal should not be communicated to Binney; for Binney also was over sixty, and might be influenced by Sergeant's decision; and those two great lawyers and friends went to their graves, each without knowing that the other had been offered a place on the supreme court of the United States.

Binney's handling of Marshall's opinion was the masterpiece of the case. He "showed at the bar" (says Wallace, in his delightful book on *The Reporters*) "that as to the principal authority cited by the Chief Justice from one of the old books there were no less than four different reports of it, all variant from each other; that as to one of the reporters, the case had been decided thirty years before the time of his report; that he was not likely to know anything personally about it; that 'he certainly knew nothing about it accurately;' that another reporter gave two versions of the case 'entirely different,' not only from that of his co-reporter, but likewise from another of his own; and that a fourth account, by a yet distinct reporter, was 'different from all the rest': that 'nothing is to be obtained from any of these reports except, perhaps, the last, that is worthy of any reliance as a true history of the case'; and that even this, the best of them, had been rejected in modern times, 'as being contrary to all principle.'"

Marshall also had said that "we have no trace, in any book, of an attempt in the court of chancery, at any time, anterior to the statute, to enforce one of these vague bequests to charitable uses;" and this was then (1819) very true; reports of chancery cases did not begin until centuries after law cases were being

reported, and very little was known about what the chancellors were doing during those centuries. But in 1827 the English Record Commission published three large volumes entitled "Calendars of the Proceedings in Chancery" in Elizabeth's reign, with examples from other reigns as far back as Richard II, containing briefly the names of the parties, the object of the bill, and a description of the property involved. From these Calendars Binney extracted fifty cases in which the Chancellor had heard bills involving charitable uses, prior to the statute,—in fact, some of them long before Elizabeth was born. "When we advert to the various objects of these bills," Binney said in his argument, "we may imagine ourselves to be reading a chancery calendar of the present day; in which parties, in some cases with no definite or particular interest, legal or equitable, ask for the supply of new trustees, for the redress of abuses, for a decree to enforce a charge upon land, or to change the investment of a charity,—in behalf of the poor, of schools, of churches, of hospitals: . . . injunction bills, bills of revivor, cross-bills; the full action of equity in all respects." On the evening of Binney's triumphant fourth and last day of argument, Webster met Wallace and said to him, "Mr. Binney has buried me under those three big folios."

There was nothing more to be said. In two weeks Story delivered the opinion of the court, sustaining the will. "Whatever doubts [he wrote] might properly be entertained upon the subject when the case of *The Trustees of the Baptist Association v. Hart's Executors* was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

What all this suggests to a Chicago lawyer is the importance of Binney's great argument to any institution like our own Chicago Bar Association whose future may be so profoundly influenced by the gain or loss of an endowment. Some day we may have to defend the validity of a noble gift to our Association for the furtherance of its far-reaching activities. Girard College is rich, and thus all the more able to do good in its field. Its grounds cover forty acres. It has twenty buildings. Land and buildings are worth more than $5,000,000, and the principal of the college's endowment is over $32,000,000. All this would have been lost to Philadelphia, and to the United States, if the city had not had a lawyer like Binney at its call. And would it not be shameful,—I will not say if one of our private clients, or one of the great municipal corporations our members represent, or a hospital, a university, or a library,—but if our own Association should lose its inheritance because no one any longer knew or cared anything about the old law-books?

OPINIONS OF THE INTERNATIONAL COURT

A Department for Reviews of the Judgments and Opinions of the Permanent Court of International Justice[1]

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Seventh Judgment of the Permanent Court of International Justice[2]—Case Concerning Certain German Interests in Polish Upper Silesia

The application in Upper Silesia of a Polish Law of expropriation would constitute a violation of Poland's obligations under the Geneva Convention relating to Upper Silesia, and the Court may give a declaratory judgment to this effect.

This proceeding was instituted by Germany against Poland on May 15, 1925, based on Article 23 of the German-Polish Convention signed at Geneva, on May 15, 1922. The Polish Government had contested the jurisdiction of the Court, but this jurisdiction had been established in a judgment given on August 25, 1925,[3] and the case had been reserved for judgment on the merits. The original submissions of Germany had been modified when the Court met on February 5, 1926, on which date hearings were begun which continued intermittently until April 16, 1926. Expert witnesses were examined by the Court in the course of these hearings, for the first time in its history.

The submissions of Germany sought a judgment (1) that the application of certain parts of the Polish expropriation law of July 14, 1920, constitutes a measure of liquidation and as such violates certain articles of the Geneva Convention of May 15, 1922; (2) that the Polish Government's attitude toward two German companies owning a nitrate factory at Chorzow, was not in conformity with the Geneva Convention, and the Court was asked to say what attitude should have been adopted toward these companies; and (3) that notices of intention to liquidate certain rural estates were not in conformity with the Geneva Convention. The Polish Government requested a non-suit as to the first of these submissions, on the ground that an abstract declaration could not be given by the Court; a judgment that as no measures of liquidation had been taken against the German companies, there was no ground for a decision as to the conformity of the Polish attitude with the provisions of the Geneva Convention; and a non-suit as to the third of the German submissions.

In the earlier proceeding, the Polish Government contested the Court's jurisdiction without

1. Continuing the series of which the last instalment was published in this Journal in January, 1926.
2. Publications of the Permanent Court of International Justice, Series A, No. 7.
3. See this Journal for January, 1926, p. 34.

success. In this case, the power of the Court was denied on the ground that no "difference of opinion" existed, as that term was used in the Geneva Convention, and on the ground that "the abstract character of the decision asked for is hardly compatible with Article 59 of the Court's statute." But the Court held that a "difference of opinion" did exist and that the provisions for the Court's jurisdiction in Article 23 of the Geneva Convention "cover interpretations unconnected with concrete cases of application." Article 59 of the Court's Statute "does not exclude purely declaratory judgments," its object being "simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes." As to the first German submission on the merits, the Court found that the application of two articles of the Polish law of 1920 was not compatible with certain provisions of the Geneva Convention, in that they would deny to private property the protection required by the Convention and would make no provision for adequate investigation of titles. Reliance by Poland on provisions in the Treaty of Versailles and the preceding armistice agreements, led the Court to examine Poland's relation to those instruments, resulting in its conclusion that none of their provisions override Poland's obligations under the Geneva Convention.

As to the second of the German submissions, Poland had attacked a transfer made by the German Government in 1920, after the Treaty of Versailles came into force, but the Court held that the alienation was not an act of bad faith, nor "an act calculated to prejudice Poland's rights," and was not a breach of Germany's engagements. The two German companies had acquired rights in the factory at Chorzow which Poland was bound by the Geneva Convention to respect, and the attitude of Poland in regard to these companies was contrary to Article 6 and following articles of the Convention. However, the Court declined to say what attitude the Polish Government ought to have adopted; the parties had furnished insufficient data for this, and the point therefore "remained in its purely interrogative form."

The rural estates to which the third German submission related were both agricultural and industrial estates. A special clause in the Geneva Convention related to rural estates "devoted principally to serving the needs of large industrial undertakings." A question was argued as to the acquisition of the surface by mining enterprises. It was necessary for the Court to examine each of the ten estates concerned, and to analyze as to some of them a mass of detail. As to five of them, it upheld the German submission. The most interesting question which arose was that of the domicile of owners whose estates were divided by the new boundary between Germany and Poland, on which the view of the Court was not at variance with the provisions of American law relating to domicile.

The judgment was given by a Court composed of six judges, three deputy-judges, and the two national judges of Germany and Poland, all of whom concurred except the Polish national judge.

Thirteenth Advisory Opinion of the Permanent Court of International Justice[4]—Competence of the International Labour Organization to Regulate, Incidentally, the Work of the Employer

The competence of the International Labour Organization extends to drawing up and to proposing labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself.

The International Labour Organization, established by Part XIII of the Treaty of Versailles, includes the International Labor Conference which holds a session each year, and the International Labor Office which is permanently located at Geneva and which is controlled by an international Governing Body. At the sixth session of the International Labour Conference in 1924, one item on the agenda was "Nightwork in Bakeries." A preliminary draft convention was adopted by the Conference, on July 5, 1924, which would prohibit night work of all persons, proprietors as well as workers, engaged in making bread, pastry or other flour confectionery, without applying, however, to work done by members of the same family for their own consumption, nor to the wholesale manufacture of biscuits. Although objection was voiced by the employers' group in the Conferences of 1924 and 1925, a Draft Convention in this sense was definitely adopted by the latter Conference on June 8, 1925, by eighty-one votes to twenty-six. The employers' representatives continued to entertain doubts as to the legality of this action on account of the application of the draft convention to the work of employers, and after some interval, the Governing Body decided, although the majority were convinced of the legality, to ask the Council of the League of Nations to request an advisory opinion of the Permanent Court of International Justice. On March 17, 1926, the Council voted to request such an opinion on the following question:

"Is it within the competence of the International Labour Organization to draw up and to propose labor legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself."

When this request was communicated to the Court, notice of it was at once sent to all members of the League of Nations, to the United States of America and to Ecuador, as well as to various international organizations considered as likely to be able to furnish information on the question submitted to the Court. The following organizations presented their views to the Court: the International Labor Organization, the International Organization of Industrial Employers, the International Federation of Trades Unions, the International Confederation of Christian Trade Unions.

The Court's opinion was handed down on July 23, 1926. The Court first pointed out that the question submitted did not relate to any particular branch of industry. It did not therefore have to consider what kind of legislation the conditions of the baking industry might justify. Moreover, the Court was not called upon "to deal with the work of the employer in general, but only in so far as such work is the same as that of the worker and

4. Publications of the Permanent Court of International Justice, Series B, No. 13.

as its regulation is incidental to a regulation proposed in order to protect certain classes of workers and to insure such protection." The word "workers" was taken to refer only to wage earners. The question put was "manifestly a question of law, the answer to which depends upon the terms of Part XIII of the Treaty of Versailles of June 29, 1919, by which the competence of the International Labour Organization is defined." The Court proceeded to examine the provisions of Part XIII in detail. It concluded that the International Labour Organization "has no legislative power" and that the "language could hardly be more comprehensive" than that which states its general objects. The Treaty itself provides "the means of checking any attempt on the part of the Organization to exceed its competence." It was therefore concluded that "the high contracting parties clearly intended to give to the International Labor Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labor and the protection of workers." The history of the Organization itself indicates various instances of labor legislation which might have application to employers, and the Court thought it not improper "to resort to practice, national or international, for the determination of the exent of a particular governmental power." It follows from the reasoning in the third Advisory Opinion of the Court, that if it is assumed "that the competence of the International Labor Organization is limited to the work of the wage-earner, the Organization is not excluded from proposing legislation for the protection of wage-earners because such legislation may have the effect of regulating at the same time and incidentally the work of the employer."

The Court was careful to point out that it was "called upon to perform a judicial function," and not to discuss or apply political principles or social theories. It did not attempt "to indicate the limitation of any discretionary powers which the International Labor Organization may possess as regards the making of incidental regulations," nor did it "essay to consider controversial cases, actual or hypothetical, on which its opinion is not asked, and to intimate what, in its judgment, the decision upon them should be." An affirmative answer was given to the question put to the Court. The opinion was "done in English and in French, the English text being authoritative."

Orders of the Permanent Court of International Justice[5]—Case Concerning the Denunciation of a Treaty Between China and Belgium

In exercise of its compulsory jurisdiction conferred by acceptance of the "Optional Clause," the Court will take jurisdiction of a case submitted by one party and order provisional measures to be taken.

The relations of Belgium and China have depended since October 27, 1866 on a treaty signed on November 2, 1865. One of the periods for which this treaty was renewed expired on October 27, 1926, and the treaty itself provided (Article 46) for the Belgium Government's giving notice of a desire to modify the treaty six months before the end of each ten year interval. The treaty makes no similar provision for modifications to be suggested by the Chinese Government. However, on April 16, 1926, the Chinese Government notified the Belgian Government that the treaty would come to an end on October 27, 1926. When efforts to conclude a *modus vivendi* failed, the treaty was formally abrogated by the Chinese Government.

Both Belgium and China were signatories of the "Optional Clause" annexed to the Statute of the Court, and on November 25, 1926, the Belgian Government filed a unilateral application with the Court, asking the Court to give judgment that the Chinese Government is not entitled to denounce the treaty, and asking that the Court, pending such judgment, indicate provisional measures to be taken for the preservation of the rights of Belgium and her nationals. Such judgment was sought whether the Chinese Government "is present or absent." At no time did the Chinese Government appear before the Court or recognize that any jurisdiction was conferred by this application. However, in view of the "Optional Clause," the President of the Court proceeded to set various dates for the filing of the written proceedings, and to vary these dates from time to time as it became necessary. In advance of the submission of the Belgian Case, the President refused to exercise the power conferred by Article 57 of the Rules of Court, and to indicate provisional measures in accordance with the then existing situation. On January 4, 1927, the Belgian Case was filed with the Court, the Belgian Government having previously filed a translation of a Chinese order which indicated that Belgian rights under the treaty had been or were about to be ignored. On January 8, 1927, the President exercised the power conferred by Article 57 of the Rules of Court, and made an order indicating provisionally the protection to which Belgium was entitled.

The protection thus ordered covered as regards Belgian nationals without passport, the right to be conducted in safety to the nearest Belgian Consulate; it covered the effective protection of Belgian missionaries; and it prescribed the continued enjoyment by Belgium of certain privileges of extraterritoriality. As regards property and shipping, the order covered protection against sequestration or seizure not in accordance with international law. As regards judicial safeguards, the order prescribed the right of Belgians and Belgian corporations to have their legal proceedings conducted in "modern courts," according to modern Chinese laws and with a right of appeal and the assistance of lawyers. It was noted in the Order that "the situation secured by the treaty to Chinese nationals resident in Belgium has undergone no modification." The Court, therefore, felt it unnecessary to make its order reciprocal so as to apply to Chinese nationals in Belgium.

Some days later, on January 17, 1927, the Belgian Government informed the Court that an agreement had been reached between the Chinese Government and the Belgian Government for reopening negotiations for the conclusion of a treaty abrogating the treaty of 1865. The Court was asked to facilitate these negotiations by extending the dates for the submission of a counter-case by China, and the President complied with this request. On February 3, 1927, the Belgian Government informed the Court that a provisional regime for protecting Belgians in

5. Publications of the Permanent Court of International Justice, Series A, No. 8.

China had been agreed upon by the two governments. This regime went somewhat beyond that prescribed by the President's order. The President of the Court then complied with a request of the Belgian Government, which the Belgian Government stated to accord with the desires of the Chinese Government, and revoked the order of January 8, 1927, by a new order issued on February 15, 1927. Again in May, 1927, the Belgian Government asked for an extension of time and on May 10, 1927, the President extended the time for the filing of the Chinese Government's counter-case. A further request for extension was made by the Belgian Government in June, and on June 18, 1927, the full Court fixed the following dates for the submission of written proceedings: for the Chinese counter-case, February 15, 1928; for the Belgian reply, April 1, 1928; for the Chinese rejoinder, May 18, 1928.

Eighth Judgment of the Permanent Court of International Justice[6]—Case Concerning the Factories at Chorzow

Under Article 23 of the Geneva Convention concerning Upper Silesia, the Court has jurisdiction to determine the existence and extent of the obligation of Poland to make reparation for injuries inflicted as a result of the seizure of nitrate factories at Charzow.

The sixth judgment of the Permanent Court of International Justice handed down on August 25, 1925, determined that the Court had jurisdiction to deal with a case concerning certain German interests in Upper Silesia. The seventh judgment of the Court handed down on May 25, 1926, dealt with the merits of the same case, and determined that the attitude of the Polish Government toward two German companies interested in the Chorzow factories was not in conformity with the provisions of the Geneva Convention. At that time, the Court refused to say what attitude would have been in conformity with those provisions. Following the judgment, the two governments entered into negotiations in an attempt to reach an amicable settlement of the claims of the two German companies, but these negotiations were futile. The failure of the negotiations led the German Government on Feb. 7, 1927, to file an application instituting proceedings against the Polish Government with respect to the reparations claimed to be due to the two German companies from the Polish Government. On March 2, 1927, the German Government filed a case in support of its application, claiming that compensation of more than ninety-six million Reichsmarks was due to the two companies; asking that the export of nitrated lime and nitrate of ammonia should be prohibited to Germany, the United States of America, to France and to Italy; and submitting that the compensation due should be paid in a particular manner with interest at 6% and with no deduction or set-off in favor of the Polish Government. Thereafter, on April 14, 1927, the Polish Government filed a preliminary objection denying the jurisdiction of the Court. An effort was then made by the German Government to secure a reference to the Court by mutual consent, but the effort led to no agreement. On June 1, 1927, the German Government replied to the preliminary objection of the Polish Government.

The consideration of the question of jurisdiction was begun on June 22, 1927, and oral statements were made by agents of the two governments before a Court consisting of ten judges, one deputy-judge, a German national judge and a Polish national judge. The judgment of the Court was given on July 26, 1927. The main controversy related to the application of Article 23 of the Convention between Germany and Poland, signed at Geneva on May 15, 1922, which read as follows (translation):[7]

"(1.) Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice. (2.) The jurisdiction of the German-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace of Versailles shall not thereby be prejudiced."

It was contended on behalf of the Polish Government that the Article did not contemplate the jurisdiction of the Court with reference to differences concerning reparations claimed, and alternately that the private parties interested were limited to the recourse to the special jurisdiction provided for in the second part of the Article.

The Court held that "differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application." The first paragraph of Article 23 should be viewed as a *compromis* which did not call for restrictive interpretation. It "constitutes a typical arbitration clause which contemplates all differences of opinion resulting from the application and interpretation of a certain number of articles" of the Convention. The Court refused to say, therefore, that it was limited under Article 23 to a statement of the fact that provisions of the convention were being improperly applied. It was found unnecessary to "take account of declarations, admissions or proposals which the parties may have made in the course of direct negotiations."

As to the second paragraph of Article 23, the tribunals to be taken into account are the Upper Silesian Arbitral Tribunal and the German—Polish Mixed Arbitral Tribunal. This part of Article 23 had been examined by the Court in its sixth Judgment, but in spite of this fact, the Court was willing once more to "examine the question in relation to the special conditions in which it presents itself on this occasion." It proceeded to find a special reason for the second paragraph of Article 23, and determined that it did not "expressly contemplate acts of the kind for which the German Government claims indemnity on behalf of the dispossessed companies." The acts of the Polish Government "constitute special measures which fall outside the normal operation of Articles 6 to 22 of the Geneva Convention, whereas the jurisdiction reserved by Article 3, paragraph 2, assumes the application of those articles." By its failure to conduct a previous investigation of the right of ownership, the Polish Government had violated the Geneva Convention, and the Court relied upon "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to

6. Publications of the Permanent Court of International Justice, Series A, No. 9.

7. The text of the Geneva Convention was published in 118 British and Foreign State Papers, pp. 365-579.

some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him."

It was strongly argued that in case of doubt, the Court should decline jurisdiction. To this the Court answered: "It is true that the Court's jurisdiction is always a limited one existing only in so far as states have accepted it; consequently, the Court will, in the event of an objection—or when it has automatically to consider the question—only assume its jurisdiction provided that the force of the arguments militating in favor of it is preponderant." In this case the intention of the parties to confer jurisdiction was "demonstrated in a manner convincing to the Court." The Court therefore affirmed its jurisdiction and reserved the case for consideration on its merits. This involved a dismissal of the Polish Government's plea to the jurisdiction, the result being reached by a vote of ten to three. The Polish national judge published a dissenting opinion.

Ninth Judgment of the Permanent Court of International Justice[8]—The Lotus Case

The principles of international law contain no prohibition against a state's taking jurisdiction to punish a national of another state, who enters its territory voluntarily, for an act done in connection with a collision between the vessels of the two countries, resulting in the death of citizens of the first.

On August 2, 1926, the Fench mail steamer *Lotus* collided with the Turkish collier *Boz-Kourt*, at a point in the Aegean Sea more than five miles from land. The Turkish collier was sunk and eight Turkish nationals lost their lives. The *Lotus* thereafter proceeded to Constantinople, where its officer of the watch, M. Demons, a French citizen, was prosecuted jointly with Hassan Bey, the captain of the Turkish vessel. M. Demons denied the jurisdiction of the Turkish courts, but the jurisdiction was upheld and he was sentenced to eighty days' imprisonment and a fine, while Hassan Bey was sentenced to a penalty more severe.

The French Government protested against this action of the Turkish courts and on the proposal of the Turkish Government, the two governments signed an agreement on October 12, 1926, to place the matter before the Permanent Court of International Justice. The precise questions submitted to the Court were the following:

"(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?

"(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?"

Both parties submitted cases and counter-cases, and oral hearings were conducted by the Court on August 2nd, 3rd, 8th-10th, 1927. The submissions of the French Government were that under the Lausanne Convention of July 24, 1923, and the principles of international law, the jurisdiction belonged exclusively to the French courts; that the action of the Turkish judicial authorities was therefore contrary to the Convention and to the principles of international law; and that an indemnity of 6,000 Turkish pounds should be paid to the French Government. The Turkish Government contented itself by asking merely that the Court give judgment in favor of the Turkish courts. Turkey not being a party to the Protocol of Signature which establishes the Statute of the Court, the Turkish representative filed the necessary declaration for the Turkish Government's accepting the Court's jurisdiction for this case. The relevant article of the Lausanne Convention is as follows (translation):

"In all matters, under reserve of Article 16 [which is not relevant], questions of judicial competence shall, in the relations between Turkey and the other contracting powers, be decided in accordance with the principles of international law."

The Court observed that the collision took place on the high seas. It was not called upon to consider whether the prosecution was in conformity with Turkish law. It treated the prosecution as one for involuntary manslaughter. The prosecution seems to have been based on Article 6 of the Turkish Penal Code of 1926, though perhaps not solely so. The question before the Court was whether the principles of international law prevent Turkey from instituting criminal proceedings in this case. The application of these principles was agreed upon in Article 15 of the Lausanne Convention, the text of which being clear, there was no occasion to resort to an analysis of the negotiations at the time of its preparation.

It was contended on behalf of the French Government that some special provision in international law should be pointed out in favor of the jurisdiction of the Turkish court; but the Court agreed with the contention of the Turkish Government that under Article 15 of the Lausanne Convention, Turkey was allowed to exercise jurisdiction whenever such jurisdiction is not in conflict with the principles of international law. "All that can be required of a state is that it should not over-step the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty." Nor is criminal jurisdiction governed by a different principle. All, or nearly all systems of law "extend their action to offenses committed outside the state which adopts them, and they do so in ways which vary from state to state. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."

In this case the nationality of the victims is one of the factors to be taken into account. No rule of international law forbids Turkey "to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently

8. Publications of the Permanent Court of International Justice, Series A, No. 10.

in a place assimilated to Turkish territory." Nor could the Court agree that the state whose flag is flown has excessive jurisdiction in such a case. "What occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the state whose flag the ship flies." Hence in this case "the same principles must be applied as if it were the territories of two different states concerned." The French had contended that the principle of exclusive jurisdiction was especially applicable in a collision case, but the Court could not accept this view. It found no decisions of international tribunals to that effect, and the decisions of national courts are not to one effect. Hence the Court arrived at the conclusion "that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown." In reaching this conclusion, the Court did not confine itself to a consideration of the arguments put forward, but included in its researches "all precedents, teachings and facts to which it had access." The judgment was therefore to the effect that the Turkish Government had not acted in conflict with the principles of international law contrary to Article 15 of the Lausanne Convention. In view of the reply to the first question, it was unnecessary to reply to the second question put to the Court.

This judgment was reached by a vote of six to six, on the casting vote of the President. Each of the six dissenting judges wrote a dissenting opinion. That by Judge John Bassett Moore is, perhaps, the most interesting, for Judge Moore dissented "solely on the connection of the pending case with Article 6 of the Turkish Penal Code." He concurred in "the judgment of the Court that there is no rule of international law by virtue of which the penal cognizance of a collision at sea, resulting in loss of life, belongs exclusively to the country of the ship by or by means of which the wrong was done." Judge Moore's defense of the opinion of the Court on this latter question is vigorous and convincing. He analyzed various decisions of municipal courts, the more important being *Queen* v. *Keyn*[9] and the case of the *Costa Rica Packet*.

As to Article 6 of the Turkish Penal Code, Judge Moore repudiated the so-called "protective" principle on which the Turkish Law was founded. "No one disputes the right of a State to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so. This concerns simply the citizen and his own government, and no other government can properly interfere. But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject." This led to a consideration of the Cutting Case between the United States and Mexico in which Judge Moore expressed the opinion that the view of the United States had been accepted in the extradition treaty between Mexico and the United States signed on February 22, 1889.

9. L. R. 2 Exch. Div. 63 (1877).

Tenth Judgment of the Permanent Court of International Justice[10]—Case of the Readaptation of the Mavrommatis Jerusalem Concessions

On August 30, 1924, in its second judgment, the Court upheld its jurisdiction to entertain the suit brought by the Greek Government against the British Government, relating to concessions in Palestine granted by the Ottoman authorities in 1914 to a Greek citizen named Mavrommatis. In its fifth judgment on March 26, 1925, the Court exercised its jurisdiction and decided that the concessions were valid, that they fell within the protection of Article 4 of the Protocol of Lausanne of July 24, 1923, and that the *concessionnaire* was entitled to have them "put into conformity with the new economic conditions prevailing in Palestine." Thereafter the Greek Government and the British Government entered into negotiations which resulted in the signing of new contracts to replace the old ones, on February 25, 1926. Plans were submitted for the execution of the new contracts, and it was alleged by the Greek Government that there was undue delay in the approval of these plans; that the delay constituted a breach of the agreement and that the British Government had violated its international obligations within the meaning of Article 11 of the Mandate for Palestine.

The application of the Greek Government, advancing these claims, was filed with the Registry of the Court May 28, 1927. The Greek Government asked that the British Government be ordered to pay reparation to the amount of £217,000 for the irreparable injury done to Mr. Mavrommatis. On August 9, 1927, the British Government filed a preliminary objection denying the jurisdiction of the Court, and asked the Court to dismiss the claim of the Greek Government. To this objection, the Greek Government filed a formal reply asking that the Court dismiss the objection and reserve the case for judgment on the merits. The judgment of the Court was handed down on October 10, 1927, after public hearings held on September 8th, 9th and 10th. A Greek national judge sat with the eleven judges of the Court.

The British Government denied the jurisdiction of the Court to decide whether its previous judgment had been complied with. Moreover, under Article 11 of the Mandate for Palestine, it was claimed that the Court's jurisdiction to deal with breaches of the international obligations of the Mandatory is restricted to cases where the "breach results from the manner in which the Palestine Administration has exercised its full power to provide for public ownership or control of any of the natural resources of the country, or of the public works, services or utilities established or to be established therein." But in this case the British said there was no exercise of such power. On this point the British contention was upheld by the Court. In a previous case the granting of the Rutenberg concessions had been examined in detail, but in this case it was not contended that the Rutenberg concessions were inconsistent with the Mavrommatis concessions.

(Continued on page 58)

10. Publications of the Permanent Court of International Justice, Series A, No. 11.

THE UNIFORMITY OF UNIFORM LAWS

Question Presented by Construction of Same Uniform Acts by Highest Courts of Various States—Legislative Provision for Interpretation and Construction in Interest of Uniformity Held Binding by Courts—Significant Decisions in Ohio and Vermont—Unique Principle Involved

By Roger Sherman Hoar*
Member of the Milwaukee Bar

THE following article is practically verbatim Chapter II of my book on "What a Business Executive Should Know About Conditional Sales," shortly to appear. But some remarks in a letter from Harry Hubbard, Esq., to the Editor of the Journal in the August number, lead me to refrain from deferring the publication of this material any longer.

Mr. Hubbard says, in criticism of the objects of the American Law Institute:

"'Uniform' State Laws do not remedy the difficulty. The 49 sovereignties and legislatures and sets of courts all remain; and the law as it finally exists is not uniform; and the practitioner must live under 49 sovereignties, each with its own laws."

May I respectfully beg to differ, and to submit the following in support of my dissent.

The fact that there exist *uniform* laws, and that the states are, to a large extent, adopting them, is proof of a popular urge toward uniformity; and any contribution toward establishing the general recognition of an absolute rule of uniformity, has constructive possibilities of great value. Such a contribution, this present article aims to be.

Just how uniform is a uniform act? If the highest court of one state construes a certain provision of a uniform act to mean one thing, will the courts of other states follow this ruling, or will they go off on their own hook, and construe the provision in some entirely different and unexpected manner, thereby rendering the uniform act no longer uniform? Mr. Hubbard evidently inclines to the latter view.

The present author knows of no single place where the answer can be found. A search of the decisions of each state under each one of the uniform acts promulgated by the Conference of Commissioners on Uniform Laws will reveal what the courts have said as to just how uniformly that particular act is to be interpreted in that particular state. But a general principle is here involved, which transcends the particular interpretation of any particular statute. The decision of this question with respect to any one uniform act should be equally applicable to all other uniform acts. Accordingly the author aims to set down in this present article all of the leading cases, of which he is aware, bearing on this subject.

The usual title given to the uniform sales act by states which adopt it is: "An Act regulating the sales of goods and to make uniform the law of sales of goods." A somewhat similar title is usually given to each of the other uniform acts in each of the states which enact it. Of such a title, the Supreme Court of Ohio has well said:

"It is so much a matter of common knowledge as to make it proper to take judicial notice of the fact that the act herein considered was enacted because of an effort on the part of the Bar of many, if not all, of the states of the Union to bring about a uniform system of law respecting negotiable instruments. . . . And wherever these acts have received judicial interpretation in the several states this purpose has been recognized. . . . That this purpose was prominent in the minds of the members of our General Assembly in the enactment of the Ohio act is shown by the title of the act itself, which is: 'An act to establish a law uniform with the laws of other states on negotiable instruments.' The desirability of such legislation had been long felt by commercial people of our state as well as by the judiciary and the Bar at large. . . . The purpose of the act is to bring Ohio into harmony with the other states of the Union on so important a branch of the law as the relation of the parties to commercial paper. . . ." *Rockfield* v. *Bank*, 83 N. E. 392, 394-395; 77 Oh. St. 311, 329-331.

Note that the act of which the Ohio court was speaking, namely, the uniform negotiable instruments law, contained no clause calling for uniformity of construction, and yet the court felt constrained, by the title and general purpose of the act alone, to employ the same construction as had been given by the courts of other states.

The *Rockfield* case derives particular weight from the fact that the rule of commercial law involved in that case had, before the passage of the uniform act, been squarely decided oppositely, in express disregard of the decisions of other states, the court saying:

"But we have found ourselves unable to concur in their holdings, reluctant as we are to differ with the courts by which they were decided, and desirable as it is that there should be uniformity of decision on so important a question of commercial law." *Ewan* v. *Brooks*, 45 N. E. 1094, 1097; 55 Oh. St. 596.

The particular holding, quoted above from the *Rockfield* case, was approved in *Richards* v. *Bank*, 90 N. E. 1000, 1002; 81 Oh. St. 348.

And not only in the *Rockfield* case, but also in other states, the courts have, without exception, recognized that the requirement of uniformity of construction of that law is binding on them. Thus we find the Supreme Court of Iowa saying:

"We must take the negotiable instruments act as it is written, and, while the general purpose was to preserve the existing law so far as it was uniform, yet in many respects in which there was a conflict or doubt under the authorities, the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected." *Vander Ploeg* v. *Van Zuuk*, 112 N. W. 807, 810; 135 Ia. 350.

The need for uniformity of law was admirably expressed by Cicero nearly two thousand years ago, as follows:

"Non erit alia lex Romae, alia Athenis; alia nunc, alia

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posthac; sed et apud omnes gentes et omni tempore, una eadem lex, obtinebit,—"

which object was quoted with approval by Lord Mansfield with respect to the maritime law (*Luke* v. *Lynde*, 2 Burr. 883, 887), and by Mr. Justice Story with respect to the negotiable instruments law. (*Swift* v. *Tyson*, 16 Peters 1, 19).

Most of the uniform acts, which have followed the negotiable instruments law in rapid succession, have contained substantially the following clause:

"This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

The Commissioner's note to this section of the uniform conditional sales act reads:

"This important section is contained in all the Uniform Commercial Acts to lead courts to consider in construing the act not only the previous jurisprudence of the state, but the law of other states."

Such clauses have, without exception, been held binding by the courts. Quotations from decisions based on such clauses follow:

"When a question arises under one of the uniform statutes, and courts of this state have not yet passed upon the interpretation of the portions of the statute involved, I conceive it to be the duty of the trial courts, in the interests of a real uniformity in the application of these commercial enactments, to adopt and follow here the interpretation adopted by the courts of other commonwealths." *Brown* v. *Rowan*, 154 N. Y. S., 1098, 1100.

"The primary purpose of the codification as expressed in its title was to make uniform the law concerning the sale of goods. Any construction of the statute, therefore, which would throw it out of harmony with rules of law generally prevailing, relating to that subject, would be in direct violation of its expressed object. It is consequently necessary to ascertain whether there is any generally accepted rule existing in other jurisdictions . . ." *Pope* v. *Ferguson*, 83 Atl. 353, 355; 82 N. J. L. 566.

"To unify the commercial law of the country was the object of the Uniform Warehouse Receipts Act. The industrial and economic necessity of such unification was pressing. To fully accomplish the purposes of the act, courts must be mindful in their interpretation that the receipts to be issued under the act were to pass current in the commercial world as negotiable documents of title. Local laws must be interpreted in the light of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world." *Salt* v. *Peoria*, 231 Pac. 415, 416; 27 Ariz. 145.

"By section 74 of the act of this state we are required to give the enactment an interpretation and construction that shall effectuate its general purpose of making uniform the laws of the states which shall enact it. In view of this requirement, decisions of the highest courts in other states having such enactment, involving its interpretation or construction, are precedents of more than persuasive authority. Speaking generally, they are precedents by which we are more or less imperatively bound, in cases where similar questions are presented." *Aetna* v. *Spaulding*, 126 Atl. 582, 585; 98 Vt. 51.

"It would be utterly futile for the Legislatures of the several states to adopt uniform laws upon any subject if each court of the several states followed the notion of its members with regard to how a particular provision should be construed and applied." *Stewart* v. *Hansen*, 218 Pacific 959, 960; 62 Utah 281.

"Missouri is too important a state, in her great commercial, industrial, and mercantile interests, to be fenced off from the other great states of our Union by a construction that would leave her people vexed with the very trouble her lawmakers were endeavoring, and, as we think, successfully, to end." *Walker* v. *Dunham*, 115 S. W. 1086, 1090; 135 Mo. App. 396.

"It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (§57): this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act, and that it should not be regarded merely as an offshoot of local law." *Commercial* v. *Canal*, 239 U. S. 520, 528-529.

Those, by the way, are the words of no less a jurist than Mr. Justice Hughes.

And compare the following decisions:

Arnet v. *Clack*, 198 Pac. 127, 129; 22 Ariz. 409; *Security* v. *Southern*, 241 Pac. 945, 956; 74 Cal. App. 734; *Bank* v. *Smith*, 179 Pac. 160, 161; 180 Cal. 1; *National* v. *National*, 132 N. E. 832, 833; 300 Ill. 103; *Bank* v. *Bilstad*, 136 N. W. 204, 205 (Iowa not reported officially); *Lightner* v. *Roach*, 95 Atl. 62, 63; 126 Md. 474; *Union* v. *McGinty*, 98 N. E. 679, 681; 212 Mass. 205; *Rudy* v. *Quincy*, 144 N. E. 286, 287; 249 Mass. 492; *Lumpkin* v. *Lutgens*, 172 N. W. 893; 143 Minn. 139; *Sommers* v. *Tintah*, 192 N. W. 492, 493; 155 Minn. 107; *Century* v. *Breitbart*, 151 N. Y. S. 588; *Hennenlotter* v. *De-Orvananos*, 186 N. Y. S. 488, 489; *Funt* v. *Schiffman*, 187 N. Y. S. 666, 667; *Joseph V. Viane*, 194 N. Y. S. 235; *Bank* v. *Stary*, 200 N. W. 505, 508; 51 N. D. 399; *Felt* v. *Bush*, 126 Pac. 688, 690; 41 Utah 462; *Howard* v. *Arbuckle*, 102 Atl. 477; 92 Vt. 86; *Howard* v. *Wilson*, 120 Atl. 889, 894; 96 Vt. 438; *Thompson* v. *Curry*, 91 S. E. 801, 802; 79 W. Va. 771; *Farmers* v. *Kingwood*, 101 S. E., 734, 736; 85 W. Va. 371.

The uniform acts, like most other statutes, contain a clause repealing all prior acts inconsistent therewith. But the Supreme Court of Vermont has gone even further. The Justices felt so impressed with the necessity that uniform acts should be *absolutely* uniform that they held that the uniform desertion act not only repealed all *in*consistent prior laws, but also repealed one perfectly *consistent* prior law. For it is evident that the existence of additional, though perfectly consistent, legislation on the subject covered by a uniform law is just as fatal to uniformity as the existence of some inconsistent provision. The court said:

"We may take judicial notice that the act of 1915 was one prepared and recommended by the national conference of commissioners on uniform state laws, and that at the time of its adoption by the Legislature of this state it had already been adopted by several of the other states . . . It would do violence to the expressed intention of the Legislature to promote uniformity of law on the subject to presume that they intended to defeat that purpose by retaining a statute which would create dissimilarity." *Ex parte Turner*, 102 Atl. 943, 946; 92 Vt. 210.

And compare:

"There is much to be said in support of the claim that the General Assembly intended the later act to form a complete system of laws on the subject of negotiable instruments." *Richards* v. *Bank*, supra. Also *Farmers* v. *Kingwood*, supra.

The doctrine, which requires a uniform construction to be given to a uniform law, cannot be ascribed to the doctrine that:

"where one state has adopted a statute of another state, which has been construed by the courts of the latter state, such decisions should be accorded very considerable weight when the question of the construction of the statute arises in the state where it has been so adopted." 15 C. J. 926. *West Key Number:* "Statutes" § 226,

for, in the first place, the quoted doctrine does not extend to *subsequent* decisions of the courts of the state which first had the law (15 C. J. 926, n. 50d), and, in the second place, the requirement of uniform construction of a uniform law is seen to be much more binding than the quoted doctrine. But the quoted doctrine should be cited, wherever applicable, to reinforce the doctrine of uniformity.

Whenever it becomes necessary for a lawyer to brief a case which requires the establishment of this principle of uniformity of construction in a state in which the principle has not yet been *expressly* recog-

nized in any reported decision, the lawyer should read all the decisions of the highest court of that state under all of such of the uniform laws as that state has adopted. Among these decisions he is sure to find many in which the rules laid down by the courts of other states have been followed as a matter of course, thus giving tacit adherence to the doctrine of uniformity. Such cases should be cited to that effect, substantially in the following lagnuage: "And this Court has frequently obeyed the *spirit* of the clauses of the uniform acts, which require uniform construction, by going at length into the decisions of other states and by considering itself bound thereby; notably in, etc."

Note that there are really two principles involved: (1) the principle of uniformity itself; and (2) the principle that a court is bound by any rule of construction expressly laid down by the legislature. In other words, a court must give to the construction placed on a uniform law by the courts of other states, the same weight as though these decisions had emanated from itself; and this for two reasons: first, because commonsense dictates that only in this way can uniform laws be truly uniform; and, secondly, because the legislature has laid down the rule, in the law itself, that thus is it to be interpreted. Accordingly the lawyer would do well to study the decisions of the state in question under the various statutory definitions and rules of construction, which most long acts of every state contain. In addition most official compilations of state laws have one chapter devoted to the construction of statutes. The decisions under such a chapter, and perhaps even some express wording of the language of the chapter itself may be in point as establishing the binding effect of statutory definitions and self-contained rules of interpretation. (36 Cyc. 1105, *West Key Number:* "Statutes," §§ 178 and 179). Furthermore such cases will add local color to the brief.

It is to be doubted that any court, if this subject of uniformity of uniform laws be properly presented to it, will fail to see the logic of the situation, or fail to be constrained by the unanimity of authority to recognize the principle that a decision interpreting a uniform law, although rendered in another jurisdiction, is just as binding on the court as though rendered in its own state. This principle is unique with respect to uniform laws. With respect to other laws, a decision from another jurisdiction is not binding at all; it is merely persuasive. But the binding effect of decisions of other jurisdictions, in the case of uniform laws, must now be regarded as a firmly established principle of jurisprudence.

NEWS OF THE ASSOCIATION'S COMMITTEES

Rules Governing Investigations and Disciplinary Proceedings

FOLLOWING are the rules respecting investigations and disciplinary proceedings of the Committee on Professional Ethics and Grievances which were approved by the Executive Committee of the American Bar Association at its midwinter meeting in New Orleans:

1. The Committee in the exercise of any of its powers may consider all information as to professional misconduct of any member of the Bar which comes to its attention irrespective of the source of the information or the form in which it is received, and it will not disclose the source of such information, except to the Executive Committee, unless it have the permission of the informant so to do.

2. The By-Laws prescribe two methods of procedure in respect to any alleged misconduct of a member of the Association, the first being where the Committee acts "upon its own motion" and the second where it acts "upon complaint preferred."

3. The usual procedure will be for the Committee to act "upon its own motion" and that method will be followed with respect to all information furnished the Committee as to alleged misconduct of members unless formal complaint be filed with it in accordance with Rule 7.

4. All matters in which the Committee acts "upon its own motion" will receive preliminary investigation to determine whether there is sufficient evidence of misconduct to justify the filing of charges against members. Such investigation may be ex parte or the Chairman may, in his discretion, inform the alleged offending member thereof and request him to answer, within a reasonable time to be fixed by the Chairman, any interrogatories pertinent to the investigation, the answer to which would not violate the confidences of a client. The interrogated member may file objections to any such interrogatories which objections shall be presented to and determined by the Committee at its next meeting.

5. After the preliminary investigation the Chairman shall decide whether charges shall be filed with the Committee against the member whose conduct has been questioned. If he decides against the filing of such charges the informants shall be notified to that effect whereupon they may (a) request that the Chairman's decision be reviewed by the Committee or (b) file a formal complaint in accordance with Rule 7. In the event that an informant should request that the Chairman's decision be reviewed by the Committee, such request shall be presented and acted upon by the Committee at its next meeting.

6. Where the Chairman determines that charges shall be filed against a member they shall be prepared under his direction and shall set forth the nature of the offense charged with specifications as to the particular facts relied upon to support such charge.

7. Any formal complaint filed against a member "upon complaint preferred," in accordance with Rule 2, shall be accompanied by supporting affidavits as to the material facts and a signed statement to the effect that the complainant intends to prosecute the respondent before the Committee. The Chairman shall determine whether such complaint shall be accepted as complying with this rule or shall be rejected for failure to do so, but any adverse decision shall be reviewed by the Committee if the complainant shall so request.

8. The respondent shall be furnished by registered mail with copies of any charge or com-

plaint made against him accompanied by a request that he answer such charge or complaint in writing addressed to the Committee within such reasonable time as is fixed by the Chairman for that Purpose, which time may be extended by the Chairman on his own initiative or upon the respondent's request. Thereafter procedure as to either charge or complaint shall be the same except that the duty of presenting evidence in support of a charge shall be upon the Attorney to the Committee, while the duty of presenting evidence in support of a complaint shall be upon the complainant, though the Attorney to the Committee may assist the complainant if the Chairman approves the complainant's request for such assistance.

9. If the Specifications supporting a charge or the allegations in support of a complaint be admitted or not controverted by the respondent, the matter shall be submitted to the Commitee after the respondent is given sufficient time to prepare and file any desired argument. He shall be notified of the time and place fixed for the consideration of the matter by the Committee and given an opportunity for oral argument before it, either in person or by attorney.

10. If the answer deny any of the specifications or allegations the matter shall be set for hearing at such time or place as the Committee or the Chairman may determine, but the respondent at such hearing, and also in case of taking testimony in advance as hereinafter provided, shall be given every reasonable opportunity to present testimony and argument in defense and to cross examine adverse witnesses, and to be present in person and to be represented by counsel. Testimony may be taken in advance of the hearing before such person or persons as the Committee or the Chairman may determine in such manner and at such time and place convenient to the respondent as the Chairman or the Committee may determine.

11. Unless specifically directed by the Executive Committee no public hearing shall be held in connection with any charge or complaint against an accused member and all matters in connection therewith shall be regarded as confidential until such time as the Committee's decision is published by order of the Executive Committee.

12. No reprimand or censure voted by the Committee shall be made public except in such manner as the Executive Committee by general rule or otherwise, shall direct.

13. All recommendations to the Executive Committee respecting forfeiture of membership shall be accompanied by a recommendation as to the specified manner in which such forfeiture shall be made public.

14. It shall be the duty of any member who is associated with other lawyers as a partner in a law firm to answer the Committee's inquiries in respect to any matter which has been handled by that law firm under its firm name, regardless of whether or not such matter was handled by an employee or partner who is not a member of the Association, provided that such answer would not violate the confidences of a client.

15. The failure of an interrogated member to answer interrogatories under Rule 4, or to answer a charge or complaint under Rule 8, or to answer any proper inquiry in connection with such charge or complaint at any stage of the proceeding, shall be sufficient ground for forfeiture of membership.

16. Any duty prescribed herein as that of the Chairman may be by him or by the Committee delegated to any Acting Chairman or to any Chairman of a Sub-Committee.

American Bar Association Committee on Federal Taxation

New York, January 3, 1928.

TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION:

The federal Revenue Bill of 1928, now in the Finance Committee of the Senate, contains radical changes in substance and form from the Revenue Act of 1926 now in force. The members of your Committee on Federal Taxation believe that some of the provisions in the pending bill are unwise and should be modified. Although your Committee is not empowered to commit the American Bar Association to any course other than the support of the recommendations adopted at the last meeting of the Association, nevertheless the members of your Committee informally and unofficially may be of service in calling the attention of Congress and its advisers to the views of the Bar on some of the provisions of the pending bill.

With that thought in mind, we shall appreciate your communicating to us any views which you may have looking to the change and reformation of provisions of the revenue bill now pending in the Senate. Without meaning to limit your expressions to any particular parts of the bill, it may be helpful to list certain sections which have already aroused discussion:

Section 44. *Installment basis.* This section provides retroactively a method of ascertaining gain or loss upon the disposition of installment obligations.

Section 104. *Accumulation of surplus to evade surtaxes—1928 or subsequent taxable years.* This section, which is designed to take the place of Section 220 of the Revenue Act of 1926, creates a classification of personal holding companies and subjects them to special penalties for failure to distribute at least 70 per cent. of their net income for each year.

Section 113. *Basis for determining gain or loss.* This section, which is generally similar to Section 204 of the Revenue Act of 1926, omits retroactively in paragraphs (7) and (8) of subdivision (a) the parenthetical clause "(other than stock or securities in a corporation a party to the reorganization)."

Section 115. *Distributions by corporations.* Subdivision (a) omits retroactively, in defining the term "dividend," the restriction to earnings or profits "accumulated after February 28, 1913."

Section 118. *Affiliated corporations.* This section in the bill as introduced in the House provided for a very limited intercorporate allowance of net losses in substitution for Section 240 of the Revenue Act of 1926. Even this restricted provision was omitted in the bill as it passed the House.

Section 506. *Waivers after expiration of period of limitation.* This section assumes to validate retroactively waivers furnished after the statute of limitations had run.

Section 604. *Suits to restrain enforcement of liability of transferee or fiduciary.* This section prohibits the remedy of injunction against the enforcement of Section 311, which embodies most of the features of Section 280 of the Revenue Act of 1926 providing for

summary remedies of collection against transferees of assets of taxpayers.

Section 605. *Alternative remedies in enforcing liability of transferees.* This section is so worded that the Commissioner may claim the right to proceed against a transferee from a taxpayer both under Section 311 (old Section 280) and also in an action at law or in equity.

Section 608. *Effect of expiration of period of limitation against taxpayer.* Subdivision (b) of this section would prohibit a refund by the Commissioner on a claim previously disallowed more than two years since, unless within such period of two years suit had been begun by the taxpayer.

Section 611. *Collections stayed by claim in abatement.* This section would attempt to extend the statute of limitations retroactively in favor of the Government, in cases in which claims for abatement had been filed, even though the liability for taxes was barred prior to June 2, 1924.

Section 612. *Repeal of Section 1106(a) of 1926 Act.* This section would attempt to repeal as of February 26, 1926, the date of the enactment of the 1926 Act, Section 1106(a), which made the bar of the statute of limitations extinguish the liability as well as bar the remedy.

Section 706. *Taxability of trusts as corporations —retroactive.* This section affects the status before 1925 of trusts which might be regarded as corporations.

As the Finance Committee of the Senate will shortly begin consideration of the revenue bill, it is important that you forward your views on the foregoing or any other provisions of the bill as speedily as possible, so that your Committee may know the attitude of the members of the Association and have their moral support in any informal representations to Congress and its advisers which may seem proper and desirable. It would be helpful if you would send your views in duplicate, one copy addressed to Hugh Satterlee, Chairman, at 52 William Street, New York, and the other addressed to George M. Morris, Secretray, 815 Fifteenth Street, Washington, D. C.

Assuring you of our appreciation of your cooperation,

Yours very truly,
COMMITTEE ON FEDERAL TAXATION,
HUGH SATTERLEE, Chairman,
GEORGE M. MORRIS, Secretary,
CHARLES S. CUSHING,
ALBERT L. HOPKINS,
LOUIS A. LECHER,
ROBERT N. MILLER,
MABEL WALKER WILLEBRANDT.

American Bar Association Committee on Commerce

Annual Meeting to be held in the Building of the Chamber of Commerce of the State of New York, 65 Liberty Street, New York City, Tuesday, Wednesday and Thursday, March 20, 21 and 22, 1928.

Agenda

Tuesday, March 20, 1928.

10:00 A. M. 1. Suggestions of—
(a) New business.
(b) Other subjects.

11:00 A. M. 2. A Bill providing for damages in collision cases on navigable waters of the United States where more than one vessel is at fault.
3. A Bill relating to bills of lading for carriage of goods by sea.

2:00 P. M. 4. Revision of calendar to provide for 13 months instead of 12.
5. Amendments to Federal Arbitration Law.

Wednesday, March 21, 1928.

10:00 A. M. 1. Amendments to the United States Anti-Trust Laws.
2. Senate Bill No. 2792, 69th Congress, known as United States Contract and Sales Bill.

2:00 P. M. 3. Bill relating to the settlement of Industrial Disputes to be enacted by the United States Congress.

Thursday, March 22, 1928.

10:00 A. M. 1. Bill relating to motor vehicles used in interstate commerce and upon highways receiving United States aid.
2. Instruments relating to interstate and foreign negotiable paper, fire insurance policies and warehouse receipts.

11:00 A. M. 3. Executive Session.

Committees of Conference of Bar Delegates

Committee on Admission and Discipline

WALTER F. DODD, ESQ., Chairman, Yale University Law School, New Haven, Conn.
FREDERIC B. CROSSLEY, ESQ., Professor of Law, Northwestern University, Chicago, Ill.
NELSON C. HUBBARD, ESQ., 1203 Wheeling Steel Bldg., Wheeling, West Va.
ROBERT H. RICHARDS, ESQ., duPont Bldg., Wilmington, Del.
CHARLES R. HOLLINGSWORTH, ESQ., 303 Eccles Bldg., Ogden, Utah.
GURNEY E. NEWLIN, ESQ., 935 Title Insurance Bldg., Los Angeles, Cal.
HENRY G. WASSON, ESQ., Frick Bldg., Pittsburgh, Pa.
HENRY W. TAFT, ESQ., 40 Wall Street, New York City.
GUY A. THOMPSON, ESQ., Liberty Central Trust Bldg., St. Louis, Mo.
EDGAR T. FELL, ESQ., 1405 Citizens Nat. Bk. Bldg., Baltimore, Md.
PHILIP WICKSER, ESQ., Buffalo Insurance Bldg., Buffalo, New York.

Committee on Rule Making Power of the Courts

JOSIAH MARVEL, Chairman, Wilmington, Del.
ROSCOE POUND, Harvard University, Cambridge, Mass.
CHARLES S. CUTTING, Chicago, Ill.
FRANK W. GRINNELL, Boston, Mass.
MISS ELIZABETH SHERIDAN, University of Pennsylvania Law School, Philadelphia, Pa.
ELIAS GATES, Bank of Commerce Bldg., Memphis, Tenn.
ELIHU ROOT, 31 Nassau St., New York City.
WADE MILLIS, Ford Bldg., Detroit, Mich.
JOSEPH J. WEBB, 519 California St., San Francisco, Cal.
HARRY S. KNIGHT, Sunbury, Pa.
E. W. HINTON, University of Chicago, Chicago, Ill.
CHARLES S. CUSHING, San Francisco, Cal.
THOMAS W. SHELTON, Norfolk, Va.
EDSON R. SUNDERLAND, University of Michigan, Ann Arbor, Mich.
THOMAS C. RIDGWAY, Bartlett Bldg., Los Angeles, Cal.
HERBERT HARLEY, 357 E. Chicago Ave., Chicago, Ill.
HENRY UPSON SIMS, First Nat. Bk. Bldg., Birmingham, Ala.
REGINALD H. SMITH, 60 State St., Boston, Mass.
JAS. GRAFTON ROGERS, Col. Nat. Bk. Bldg., Denver, Col.
PHILIP J. WICKSER, 6 Buffalo Ins. Bldg., Buffalo, N. Y.

NATHAN W. MACCHESNEY, 30 N. La Salle St., Chicago, Ill.

Committee on Relations Between the Press and the Bar

ANDREW R. SHERRIFF, ESQ., Chairman, 112 West Adams St., Chicago, Ill.
WENDELL H. CLOUD, 718 Scarritt Bldg., Kansas City, Mo.
JULIUS HENRY COHEN, ESQ., 70 Trinity Place, New York City.
THOMAS R. FRANKLIN, ESQ., 215 W. Commerce St., San Antonio, Texas.
GEORGE E. ALTER, Park Bldg., Pittsburgh, Pa.
HAROLD B. BEITLER, ESQ., 1612 Market St., Philadelphia, Pa.
ROBERT GRAY DODGE, ESQ., 735 Exchange Bldg., Boston, Mass.
W. CALVIN CHESTNUT, Calvert Bldg., Baltimore, Md.
ANDREW W. GILLETTE, ESQ., 926 Equitable Bldg., Denver, Colo.
ARTHUR J. POWELL, ESQ., Citizens Southern Bk. Bldg., Atlanta, Ga.
JOSEPH J. WEBB, ESQ., 519 California St., San Francisco, Cal.
CHARLES L. NICHOLS, ESQ., Title Insurance Bldg., Los Angeles, Cal.

Committee on State Bar Organization

CLARENCE N. GOODWIN, Chairman, 7 S. Dearborn St., Chicago, Ill.
HARRY S. KNIGHT, Sunbury, Pa.
JAMES F. AILSHIE, Federal Bldg., Boise, Idaho.
WALTER P. ARMSTRONG, Bank of Commerce & Trust Co. Bldg., Memphis, Tenn.
EDMOND R. BECKWITH, 135 Broadway, New York City.
JOHN D. BLACK, 1400 First National Bank Bldg., Chicago, Ill.
RUSH C. BUTLER, 314 Monadnock Block, Chicago, Ill.
KEMPER CAMPBELL, 1408 Chapman Bldg., Los Angeles, Cal.
JEFF P. CHANDLER, 617 A. G. Bartlett Bldg., Los Angeles, Cal.
CLYDE H. DOOLITTLE, First National Bank Bldg., Manchester, Ia.
LOREN GRINSTEAD, 1403 Dexter-Horton Bldg., Seattle, Wash.
WILLIAM G. HALE, Law School, University of Oregon, Eugene, Oregon.
GEORGE B. HARRIS, 890 Union Trust Bldg., Cleveland, Ohio.
ROBERT R. JACKSON, 600 Fenton Bldg., Jamestown, N. Y.
B. H. KIZER, 1230 Old National Bank Bldg., Spokane, Wash.
LOUIS MARSHALL, 120 Broadway, New York City.
JOSEPH MCCARTHY, Paulsen Bldg., Spokane, Wash.
MORRIS B. MITCHELL, 1330 First Nat. Soo Line Bldg., Minneapolis, Minn.
JOHN R. MONTGOMERY, 209 S. La Salle St., Chicago, Ill.
JOHN G. SAXE, 30 Broad St., New York City.
HENRY UPSON SIMS, 1010 First National Bank Bldg., Birmingham, Ala.
ARTHUR E. SUTHERLAND, Rochester Savings Bank Bldg., Rochester, N. Y.
ROBERT B. TUNSTALL, Citizens Bank Bldg., Norfolk, Va.

The Growth of Anglo-American Law During and Since the Days of Benjamin Franklin

(Continued from page 12)

fences, malicious maiming, manslaughter, witchcraft and conjuration, arson, counterfeiting, and uttering counterfeit gold and silver coins and bills of credit, piracy, and concealing the death of a bastard. All these crimes, except *perhaps* the impossible one of witchcraft, were capital at the Revolution. Various efforts were made to ameliorate this code, particularly in 1786 and in 1790, but the most effective blow to cruelty was by the Act of 22d April, 1794, which, after abolishing the benefit of clergy, succinctly declared that "no crime whatsoever, hereafter committed (except murder of the first degree) shall be punished with death." The act then proceeded to define murder of the first and second degrees, and to proportion punishments by imprisonment to the varying character of numerous offences. (See 1 Smith's "Laws of Penna.," 105 *et seq.;* 3 Smith's Laws, 187 *et seq.*)

It is a matter of pride to us to know that this truly great statute, which, by its comprehensive provisions, anticipated the aggregated results of all of the criminal law reforms of England by more than sixty years, was the work of William Bradford of Pennsylvania, one of our fellow members, who, inspired by the benevolence of Penn, sustained his arguments by a close study of Montesquieu and Beccaria. In a Memoir presented by Bradford, by request, to the Governor of Pennsylvania, published in 1793, he laid down principles which have become axiomatic: "that the prevention of crimes is the sole end of punishment"; "that every punishment which is not absolutely necessary for the purpose is a cruel and tyrannical act"; and "that every penalty should be proportional to the offence."

In 1795, the Memoir was published in London, and had a profound effect. It was hailed as "the production of a man of taste, genius and reading," that "every expanded mind that deplored the unnecessary destruction of human life by public executions" would "derive exalted satisfaction" from its perusal.

That which chiefly troubled Franklin was the transportation to the colonies under judicial sentences of British convicts, whom he regarded as undesirable citizens. He dealt with the evil in his characteristic way. Instead of addressing a direct protest to the Prime Minister, he sent a large box filled with live rattlesnakes to Sir Robert Walpole, with a letter assuring him that if the serpents were let loose in Kew Gardens they would prove to be no more harmful than the "rattle-snake convicts" shipped to America. When the Declaration of Independence put a stop to the practice, the British judges resorted to Australia as a dumping-ground for those who escaped the gallows through the humaner sentence of transportation.

The Constitution of the United States, and the State Constitutions by forbidding the imposition of "cruel and unusual punishments," by the gift of the rights to a defence by counsel, to copies of the indictment, to the compulsory attendance of witnesses and to a trial by jury, marked the American advance in criminal law reform at least fifty years before most of these rights became established in England.

In 1827, and again in 1860, Commissioners were appointed to revise the Penal Code of Pennsylvania, and the results of elaborate reports were enacted into statutes, which covered the management of prisons. At present, the subject is receiving the careful study of judges and members of the bar.

I must bring this rapid sketch of great movements to a close. I have been obliged to confine myself to the vital organs of the matter, without dwelling upon functions or mechanisms. I have necessarily omitted all reference to Private law—the law of Personal Relations, of Husband and Wife, of Married Women, of Parent and Child, of Guardian and Ward; of Trustee and Cestui que trust; of Title to Land, of Insurance, of Bonds, Mortgages and Liens, of Commercial Paper, of Partnership, of Corporations, of Banks and Banking, of Railroads and Common Carriers, of Sales and Bailments, of Receiverships, of Combinations in Restraint of Trade, of Evidence, of Equity Practice, of the Abolition of Imprisonment for Debt, and

Improvements in Procedure. There are many things yet to be done, but they are on the way.

Sufficient has been submitted, I respectfully submit, to convince the most skeptical that Law, the most conservative of the Sciences, is not static, but has advanced as rapidly as was consistent with safety in the progress of the years.

Opinions of the International Court

(Continued from page 50)

"The question whether, in a given case, there has been an exercise of the full power to provide for public control is essentially a question that can only be decided for each particular case as it arises." The previous judgment sustaining the jurisdiction of the Court had been carefully limited and the Court was resolved to make no departure from it. The facts alleged by the Greek Government in support of its claim did not show any exercise of the "full power to provide for . . . public control" under Article 11 of the Mandate. The grant of the new concessions was not an exercise of that power. The alleged non-approval of the plans within the time agreed upon did not constitute an exercise of the full power of public control, nor was any incompatibility alleged to exist between the Mavrommatis and the Rutenberg concessions, although a claim advanced by Rutenberg may have been partly responsible for the delay.

The Court therefore upheld the British preliminary objection, and refused to reserve the case for judgment on the merits. Three of the judges, including the Greek national judge, dissented. The case is notable as the first in which the Court has upheld a plea to its jurisdiction.

The Whole Duty of Law Schools

"A law school has not done its whole duty when it has sent forth well trained lawyers to take up the practice of their profession. The lawyer of tomorrow has more to do than merely to earn a livelihood by faithfully representing his clients. He has a creative task before him to be carried out in bar associations, in the legislature and as a citizen, in making our law no less effective as an instrument of justice in the century that is upon us than it was the century that is past. Nor is the task of the law school done when it has bred lawyers equal to that work. It must learn to do the work of research. It should learn to organize and carry forward the research which must go before creative lawmaking. I look forward to a group of law schools in this country in which legal scholars shall be the means of bringing together the technique and the experience of lawyers and of social workers and of making each fruitful for the advancement of justice—for the furthering of reason and the will of God."—Roscoe Pound in address before Indiana Conference on Social Work.

Nebraska

Nebraska Bar Holds Annual Meeting

The Nebraska State Bar Association held its 28th annual meeting at Omaha on December 28 and 29. The meeting was the largest in attendance and the best from the point of view of program and interest ever held by the Association. One hundred and sixty-two new members were admitted, bringing the total membership to 1255.

The program embraced an address of welcome by Mr. George N. Mecham, President of the Omaha Bar Association, and a response by Mr. C. H. Stewart, of Norfolk; presidential address by Hon. Fred S. Berry, of Wayne; address on the subject of "Are Lawyers Constructive?" by Hon. Silas H. Strawn, President of the American Bar Association; an address on "Mending the Constitution," by Hon. F. Dumont Smith, President of the Kansas Bar Association and Chairman of the Committee on Citizenship of the American Bar Association; and an address, "The Future of the Common Law," by Dean Roscoe Pound, of Harvard University Law School.

Reports of Committees and discussions occupied most of the sessions. The report of the Committee on Legislation, of which Richard F. Stout was chairman, stated that the bill recommended by the Committee to prohibit a lawyer residing and admitted to practice in another state from appearing as counsel in any action in the courts of Nebraska, unless he have associated with him and appearing in the action a lawyer admitted to practice in the courts of Nebraska, had been passed and had received the Governor's signature, with an amendment providing for reciprocity. The Uniform chattel mortgage law had failed of passage, as did also the school law recommended by the Americanization Committee. However a portion of the bill in which the committee on Americanization was especially interested was embraced in another bill which did pass.

The committee recommends that the Supreme Court of Nebraska enact rules definitely and in detail outlining the procedure to be followed in disbarment matters. It also recommends that the next legislature amend certain sections of the statute in order to remedy "the unsatisfactory conditions of our Nebraska statute as to liens of federal judgments and also as to liens of state judgments" and to insure that the state will have a law that is effective as to liens of federal judgments by providing the requisite conformity between requirements as to attaching of liens of federal and state court judgments. The advisability of this legislation was brought forcibly to the committee's attention by the recent U. S. Supreme Court decision in Rhea vs. Smith, May 31, 1927.

The Committee on Legal Education, of which W. C. Fraser of Omaha was Chairman, reported that a bill raising the requirements for admission to the bar had passed the House, but had failed to secure favorable action by the Senate Judiciary Committee. This was due to unfortunate complications that arose at the hearing, but the Committee stated that it was of the opinion that a majority of the Senate Judiciary Committee was in fact in favor of the bill. It recommended that the effort to secure enactment of this or similar legislation be continued until a successful result was attained.

The committee on American Citizenship, of which Hon. Charles E. Matson was chairman, outlined the work of the committee during the last year in furtherance of American ideals of constitutional government. It had cooperated with the Nebraska High School Debating League and other organizations to this end. The report concluded with a pledge of "the support of this association and its members to the Nebraska State Teachers Association and the American Legion of Nebraska in executing such plan or plans as may be mutually agreed upon for better and more intensive teaching of the federal constitution and the principles and ideals of the republic to adults as well as school children."

A special Committee on Cooperation with the American Law Institute, of which Charles A. Goss was chairman, presented a report showing the character and progress of the work of the American Law Institute. It recommended that Article IV of the Constitution of the state association be amended to provide for a standing committee on cooperation with the American Law Institute, to consist of five members to be appointed by the president of the Association, one of whom shall be a member of the Nebraska District Judges Association. It further recommended that in addition to the foregoing members, all members of the American Law Institute from Nebraska shall be ex-officio members of the committee. The committee stated that an annotation of the restatement comparing the text of the restatement with the holdings of the Nebraska Supreme Court would be a distinct service to both the Nebraska Bar and the Institute.

The 28th annual banquet was also the largest ever held by the Association. Judge J. W. Woodrough presided as Toastmaster and the speakers were Hon. James M. Lanigan, Senator F. Dumont Smith, Dean Roscoe Pound, Gen. John J. Pershing, and President Elect Robert W. Devoe of Lincoln.

Officers elected for 1928 are: President, Robert W. Devoe, Lincoln; Vice-Presidents, W. M. Kane of Fremont, James M. Lanigan of Greeley, and Lyle E. Jackson of Neligh; Secretary, Arthur M. Johnson of Omaha; Treasurer, Virgil J. Haggart of Omaha; Member of Executive Council, T. J. McGuire of Omaha.

ANAN RAYMOND, Secretary.

Oklahoma

Oklahoma's Annual Meeting

The Oklahoma State Bar Association met in its annual session at Tulsa, Oklahoma, on December second and third. The meeting was called to order by Edgar A. de Meules, president.

The Association authorized the following special committees:

(a) Special commitee with instructions to formulate a report upon a proposed revision of our criminal procedural statutes and to present the same to the next annual meeting.

(b) Special committee to prepare, draft and recommend to the next annual meeting of the Association a comprehensive code of the laws of private corporations.

(c) Special committee with directions to prepare and submit to the next annual meeting of the Association a simplified method of appellate procedure.

(d) Special committee on the rule-making power of the courts.

(e) Special committee to prepare a proposed bill for the creation of a judicial council.

(f) Special committee with instructions to formulate and to present to the next annual meeting of the Association a proposed act for the self-government of the bar of this State.

On Friday evening, December second, Ex-Senator Geo. H. Williams delivered an address upon "Article Five of the Federal Constitution."

At the close of the session on Saturday, December third, the following officers for the ensuing year were elected: H. G. McKeever, Enid, Okla., president; L. D. Threlkeld, Oklahoma City, Treasurer; Mont F. Highley, Oklahoma City, Secretary.

On Saturday evening the annual banquet was held at the conclusion of which the session adjourned.

MONT F. HIGHLEY, Secretary.

Vermont

Fiftieth Annual Meeting of the Vermont Bar Association

The fiftieth annual meeting of the Vermont Bar Association was held in the assembly hall of the National Life Insurance Company at Montpelier on January 3rd, 1928, with President Walter S. Fenton of Rutland, presiding. Owing to the recent flood disaster with the re-

sulting difficulties of transportation, plans for an elaborate fiftieth anniversary meeting had to be abandoned, but the sessions were well attended and proved very successful. Several of the early members of the Association were present and spoke, one of whom was Hon. John H. Watson, Chief Justice of the Supreme Court.

Two memorial addresses of exceptional merit were read, one on Lieut.-Governor S. Hollister Jackson by John W. Gordon of Barre, and one on Justice Frank L. Fish by Marvelle C. Webber of Rutland. A very interesting talk was given by the Hon. Wm. B. C. Stickney of Bethel, dean of the Bar of the State, who gave reminiscences of his sixty years of active practice.

At the evening meeting, Hon. Alfred L. Sherman, recently appointed Superior Judge, made a few remarks and Hon. John E. Weeks, Governor of Vermont, gave a fine and inspiring address. A social hour and refreshments were enjoyed after the meeting.

The present membership of the Association is 272, including nine new members elected at this meeting.

The following officers were elected for the ensuing year: President, Geo. M. Hogan, St. Albans; Vice-Presidents—David S. Conant, St. Johnsbury; Homer L. Skeels, Ludlow; Wm. H. Edwards, Burlington; Secretary, Harrison J. Conant, Montpelier; Treasurer, Webster E. Miller, Montpelier; Member of the Board of Managers, Chas. F. Black, Burlington.

H. J. CONANT, Secretary.

Miscellaneous

Miscellaneous

A hand illuminated address, prepared on parchment, and suitably bound, was presented to Hon. Walter H. Sanborn by the Ramsey County Bar Association, at a dinner had in his honor at the Minnesota Club in St. Paul on November 21st, 1927. The wording of the address was prepared by Hon. T. D. O'Brien, a former Associate Justice of the Minnesota Supreme Court.

Judge O'Brien presided, and the speakers were Kenneth G. Brill, as president of the local Association, Carl W. Cummins, Hon. Fred N. Dickson, former Judge of District Court of this County, Charles Donnelly, president of the Northern Pacific Railway Company, and Charles W. Bunn, vice-president and special counsel of the Northern Pacific Railway Company.

The dinner was merely an evidence of the esteem and affection in which Judge Sanborn is held by the members of the Bar of which he was a member, before his elevation to the bench. It was confined to members of the local bench and bar.

Following is the wording of the address presented to Judge Sanborn.

TO THE HONORABLE WALTER H. SANBORN, PRESIDING JUDGE OF UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT:

For more than a generation you have been a member of the Federal Judiciary, the department to which has been entrusted the soul of the American Republic.

Your courage, industry, learning, and complete impartiality, illuminate the many important decisions you have rendered, your courtesy and patience are written upon our hearts.

The members of the Ramsey County Bar of Minnesota, to which as an honored and successful practitioner you first belonged, extend their congratulations upon your Public Service, with the hope that you will long continue to ornament the High Office you have so brilliantly occupied.

RAMSEY COUNTY BAR ASSOCIATION,
Kenneth G. Brill, President.
Milton C. Lightner, Secretary.
St. Paul, Minnesota,
November 21, 1927.

At a recent meeting of the Fort Worth and Tarrant County Bar Association the following officers were elected: Sam Sayers, President; George Conner, Hugh Smith, and W. Erskine Williams, Vice-Presidents; George C. Kemble, Secretary and Treasurer.

George Thompson, A. W. Christian, W. D. Smith and H. C. Ware were named as Directors of the Association.

Pursuant to a resolution adopted at the last annual meeting of the New York State Bar Association, President Sutherland appointed a Special Committee on Public Defender, consisting of Messrs. Mayer C. Goldman, Einar Chrystie, Thomas I. Sheridan, George H. Boyce and Leonard McGee.

The function of this Committee is to investigate the necessity of providing competent counsel to represent indigent accused persons, to consider the creation of a Public Defender, to consider such other practicable suggestions as may be necessary to better safeguard the rights of those accused of crime, to cooperate with other Bar Associations, organizations and individuals and to report at the coming annual meeting of the Association.

The Committee contemplates holding a public hearing at some convenient place in the near future for the purpose of receiving suggestions or plans in reference to the aforesaid matters, and it invites members of the Bar and others who may be interested, to forward their suggestions and recommendations with regard thereto, to Mr. Mayer C. Goldman, Chairman, 570 Seventh Avenue, New York City.

Give All Something to Do

"Many members of local bar associations are anxious to participate in the active work of the association. They are interested in it and they feel equipped to do the work well. The failure to recognize this fact and this psychology is responsible for the lack of success of many local bar associations. If Los Angeles Bar Association is the most active in the United States, it is because there has been recognition here of the fact that almost every member of the bar is not only able to make a valued contribution to the upbuilding of his profession and the administration of justice but he is very willing to do so.

"There should be rapid rotation in office so that equal opportunity will be given to all to engage in the work of the Association. In my judgment there is nothing more deadening to bar association endeavor than to retain the same officers and the same chairmen of committees year after year. There should be a succession of new blood and new enthusiasms. Ample training has been afforded through committee memberships, meetings, conferences and current bar association literature.

"In Los Angeles Bar Association, in response to a circular sent out by me at the beginning of the year, there have been 600 assignments to regularly constituted committees of those who volunteered for active service and who pledged themselves to devote from one to several hours per week in the work of the Association. The assumption by the incorporated State Bar of the principal burdens of discipline will allow the numerous committees and sections of the Association to function even more vigorously than at present."—From article by President Kemper Campbell of the Los Angeles Bar Association in the Bar Association Bulletin for October.